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CONSTITUTIONAL LAW — EVIDENTIARY PRIVILEGE — IN AN INDICTMENT DISMISSAL HEARING, A REPORTER'S PRIVILEGE TO REFUSE VERIFICATION OF A SELF-AVOWED SOURCE IS QUALIFIED AND MUST BE BALANCED AGAINST SOCIETAL INTERESTS AND THE RIGHTS OF THE DEFENDANT.

United States v. Criden (1980)

Attorney Howard Criden and Philadelphia City Councilmen Harry P. Jannotti, Louis C. Johanson, and George X. Schwartz were indicted by a federal grand jury for violations of the Anti-Racketeering Act and the Hobbs Act.[1] The alleged violations were exposed during a government undercover operation known as ABSCAM.[2] The defendants sought to have the indictments dismissed for prosecutorial misconduct, charging that the government had deliberately released sensational and prejudicial information to the news media in the hope of creating an atmosphere inimical to the defendants' rights.[3]

At the indictment dismissal hearing, Jan Schaffer, a reporter who covered the ABSCAM story for the Philadelphia Inquirer,[4] was subpoenaed as a defense witness to determine the scope and purpose of her contacts with Peter Vaira, the United States Attorney for the Eastern District of Pennsylvania.[5] Vaira had previously testified that although

1. United States v. Criden, 633 F.2d 346, 348 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 924 (1981). *See* 18 U.S.C. §§ 1951, 1962 (1976).

2. 633 F.2d at 348. The defendants were charged with receiving illegal payments from FBI undercover agents posing as Arab sheiks. *Id.*

3. *Id.* at 354. Specifically, the defense charged that the government had "intentionally caused the premature and excessive media coverage of the ABSCAM investigation, in order to stampede the grand jury into returning the indictment, and in order to preclude responsible officials in the Justice Department from declining to prosecute." *Id.* (citations omitted). FBI officials have described ABSCAM as an operation of major proportions, beginning in 1978 or earlier, but not focusing on public officials until the fall of 1979. *Id.* at 348. On approximately December 12, 1979, Thomas P. Puccio, chief of the Justice Department's Organized Crime Strike Force in Brooklyn, New York, who was the head of the operation from its inception, transmitted a detailed memorandum describing ABSCAM to top government officials in Washington. *Id.* at 349. Later both Puccio and Peter Vaira, the United States Attorney for the Eastern District of Pennsylvania, testified that the intimate details from the memorandum had been leaked to the press by unknown government officials. *Id.*

4. *Id.* at 349-51. Schaffer wrote an exposé of the ABSCAM operation one or two days after the breaking of the story on national television. *Id.* at 349.

5. *Id.* at 349-51. Vaira had testified that he had learned on February 2, 1980 that the ABSCAM operation was about to be exposed in the national media. *Id.* at 349. As a favor to Schaffer, Vaira told her that the story was

he had confirmed some of the information which Schaffer had gathered from sources unknown to him, he was not the primary source of her news article on ABSCAM.[6] While on the witness stand, Schaffer refused to either confirm or deny Vaira's statements.[7] Schaffer predicated her refusal on the assertion that an answer would have revealed, either directly or indirectly, a source of news and was therefore violative of a journalist's qualified first amendment right to the confidentiality of her sources.[8] When Schaffer persisted in her refusal to testify,[9] the district court cited her for civil contempt of court.[10]

On appeal, the United States Court of Appeals for the Third Circuit[11] affirmed the contempt citation, *holding* that although a journalist has a qualified first amendment evidentiary privilege not to reveal her sources, the privilege does not permit the journalist to refuse to affirm or deny that she had a conversation with a self-avowed source where the conversation is arguably relevant to the motivation and credibility of that source. *United States v. Criden,* 633 F.2d 346 (3d Cir. 1980), *cert. denied,* 101 S. Ct. 924 (1981).

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breaking and advised her to "catch up" on the story. *Id.* Although Vaira admitted on direct examination that he had confirmed parts of information Schaffer had gathered from unknown sources, he denied allegations that he was the source of the information which Schaffer used to write her exposé. *Id.*

6. *Id.* at 349.

7. *Id.* at 350. The question which was asked and which Schaffer refused to answer was: "On February 2, 1980, did you have a conversation with Mr. Vaira concerning ABSCAM?" *Id.* Schaffer was directed by the court to answer the question either yes or no. *Id.* The trial court then reiterated to Schaffer that she was being asked nothing more than whether she had had a conversation with Vaira. *Id.*

The *Criden* court emphasized that the explicit question before the court was whether Schaffer was required to confirm a conversation she had with Vaira, a self-avowed source. *Id.* at 358. Further, the court found the case to implicitly present the question of whether Schaffer was required to "reveal the substance of Vaira's conversation with her, omitting portions that explicitly identify other sources." *Id.*

8. *Id.* at 350. Schaffer further asserted that the ABSCAM defendants had failed to show that the information sought was crucial to their defense or that the information sought was unavailable from other sources. *Id.* Schaffer also asserted that the compelled disclosure of sources was premature. *Id.*

9. *Id.*

10. *Id.* The court gave Schaffer the ability to purge herself of the contempt citation by answering the question. *Id.* The judge remanded Schaffer into the custody of the United States Marshal until she answered the question. *Id.* If Schaffer did not answer the question within six months, she would have been freed. *Id.*

Subsequently, Schaffer decided to testify and she purged herself of the contempt citation by answering the prosecutor's question with one word — "yes." *In re* Jan Schaffer Contempt Hearing, No. 80-00166-01, document No. 117 (E.D. Pa. Feb. 4, 1981).

11. The case was heard by Judges Aldisert and Hunter and Judge Sylvia H. Rambo of the United States District Court for the Middle District of Pennsylvania, sitting by designation. Judge Aldisert wrote the majority opinion and Judge Rambo filed a concurring opinion.

Neither the common law of England nor the United States provides journalists with the privilege to conceal confidential sources.[12] The rule was that every man owed his testimony when called by the government to give evidence.[13] Society's need for confidential relationships was deemed to be subordinate to the demand for truth in a court of law.[14] There was a single exception to the common law rule which allowed an evidentiary privilege for the communications between the attorney and his client.[15] Modified forms of an evidentiary privilege were only reluctantly granted to the priest-penitent [16] and the physician-

12. J. WIGMORE, EVIDENCE § 2286, at 528-30 (McNaughton rev. ed. 1961). For a general discussion of journalist's privilege, *see* D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information,* 6 HARV. J. LEGIS. 307 (1969); Goodale, Branzburg v. Hayes, *and the Developing Qualified Privilege for Newsmen,* 26 HASTINGS L.J. 709 (1975); Comment, *The Newsman's Privilege After* Branzburg, *The Case for a Federal Shield Law,* 24 U.C.L.A. L. REV. 160 (1976); Note, *Reporters and Their Sources, The Constitutional Right to a Confidential Relationship,* 80 YALE L.J. 317 (1970).

13. J. WIGMORE, *supra* note 12, § 2286, at 528-30. Nelson, *The Newsmen's Privilege Against Disclosure of Confidential Sources of Information,* 6 HARV. J. LEGIS. 307 (1969). For a general overview of the historical developments in journalist privilege, *see* Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information,* 36 VA. L. REV. 61 (1950).

For a recent and comprehensive work on journalist privilege, *see* J. BARRON & C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS (1979). For a discussion of the development of special press rights, *see* Benason, *The New Free Press Guarantee,* 63 VA. L. REV. 731 (1972); Lange, *The Speech and Press Clauses,* 23 U.C.L.A. L. REV. 77 (1975).

14. J. WIGMORE, *supra* note 12, § 2285, at 528, *citing* Cox v. Montague, 78 F. 845 (6th Cir. 1897); Roof v. State, 34 Okla. Crim. 145, 245 P. 666 (1926).

15. J. WIGMORE, *supra* note 12, § 2290, at 543. Wigmore states that the attorney-client privilege first arose in the very early common law as protection for the oath and honor of the attorney rather than for the protection of the client. *Id.*

Wigmore has determined that four fundamental conditions are recognized as prerequisites for the establishment of a privilege against the disclosure of a communication:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relationship by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id. § 2285, at 527 (emphasis added).

Although it would seem fundamental to our legal system that full disclosure between attorney and client is necessary to properly advise the client, Wigmore is uncertain of both the soundness and necessity of the privilege. *See id.* § 2290, at 554.

16. *Id.* § 2394, at 869-78. Wigmore found that although the privilege for priest-penitent was not officially recognized in English courts, disclosure was seldom compelled and the privilege was recognized in practice. *Id.* § 2394, at

patient relationships.[17] Journalists, like accountants[18] and social workers[19] were denied an evidentiary privilege because the courts felt that any further extension of the privilege was at variance with the demands of justice.[20] Although journalists have been moderately successful in persuading state legislatures to enact "shield laws," these statutory forms of testimonial privilege have been passed in only twenty-six states, and offer varying degrees of protection, and, despite their repeated efforts, journalists have never prompted the enactment of a federal shield law.[21]

After failing in their efforts to establish a common law privilege, or analogize their profession to the professions traditionally granted

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870. In the United States, modern rulings are rare. *Id.* § 2394, at 873. A case upholding the privilege acknowledged that the common law did not explicitly recognize it. *See* United States v. Mullen, 263 F.2d 275, 278 (D.C. Cir. 1959).

17. J. WIGMORE, *supra* note 12, § 2380, at 818. The privilege arose out of the medical profession's desire to have the same rights of confidentiality as the legal profession. *Id.* § 2380a, at 830. However, the argument for the establishment of a physician-patient privilege arose from a different and less compelling basis, namely, the view of medical practitioners that the privilege was necessary for the *honor of their profession. Id.* § 2380a, at 831 (emphasis in original). The physcian-patient privilege would probably never have arisen at all in the United States except for the codification of the privilege by the New York legislature. *Id.* § 2380, at 819. It is now accepted by about two-thirds of the states. *Id.* § 2380, at 820.

18. Couch v. United States, 409 U.S. 322, 325 (1973) (no confidential accountant-client privilege exists under federal law, and no state created privilege has been recognized in federal cases). *Contra,* PA. STAT. ANN. tit. 63, § 9.11(a) (Purdon Supp. 1980-81) (privileged communication for Certified Public Accountants).

19. Fitzgerald v. A.L. Burbank & Co., 451 F.2d 670, 682 (2d Cir. 1971) (no privilege for communications arising in interview with psychiatric social worker).

20. J. WIGMORE, *supra* note 12 § 2286, at 528. *See* J. BARRON & C. DIENES, *supra* note 13, at 419-21.

21. For a comparison of the statutes which have been enacted, *see* ALA. CODE tit. 12, § 12-21-142 (1975); ALASKA STAT. § 09.25.150 (1973); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1980-81); ARK. STAT. ANN. § 43-917 (1977 Replacement); CAL. EVID. CODE § 1070 (West Supp. 1980); DEL. CODE ANN. tit. 10, § 4320-26 (Michie 1974); ILL. ANN. STAT. ch. 51, §§ 111-119 (Smith-Hurd Supp. 1980-81); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1980); KY. REV. STAT. ANN. § 421.100 (Baldwin 1969); LA. REV. STAT. ANN. §§ 45:1451-1454 (West Supp. 1981); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1974); MICH. STAT. ANN. § 28.945(1) (Callaghan 1972); MINN. STAT. ANN. §§ 595-021-025 (West Supp. 1981); MONT. REV. CODES ANN. §§ 26-1-901 to 03 (1979 Replacement); NEB. REV. STAT. §§ 20-144 to 20-147 (1977); NEV. REV. STAT. tit. § 49-275 (1975); N.J. STAT. ANN. §§ 2A:84A-21 to 21a (West Supp. 1980-81); N.M. STAT. ANN. § 38-6-7 (Supp. 1978); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976); N.D. CENT. CODE § 31-01-06.2 (1976); OHIO REV. CODE ANN. § 2739.12 (Page 1954), § 2739.04 (Page Supp. 1980); OKLA. STAT. ANN. tit. 12, §§ 385.1-385.3 (West 1980); OR. REV. STAT. §§ 44.510-.540 (1979); 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1980); R.I. GEN. LAWS §§ 9-19.1-1 to 1.3 (Supp. 1980); TENN. CODE ANN. §§ 24-1-208 (1980).

However, no consistent interpretation of these shield laws has emerged and state courts have generally given a narrow interpretation with respect to the type of material protected. J. BARRON & C. DIENES, *supra* note 13, at 421.

testimonial privileges,[22] journalists argued that the first amendment affords them a constitutionally based privilege to withhold news sources.[23] The first such argument was not made until 1958,[24] and received a poor reception in both state[25] and federal courts.[26] The

For one Senator's account of the legislative deliberations on several recent attempts to enact a federal shield law, *see* Ervin, *In Pursuit of A Press Privilege,* 11 HARV. J. LEGIS. 233 (1974).

22. *See generally* Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources,* 64 NW. U.L. REV. 18 (1969); Comment, *The Newsmens Privilege Two Years After* Branzburg v. Hayes: *The First Amendment in Jeopardy,* 49 TULANE L. REV. 417 (1975).

23. J. BARRON & C. DIENES, *supra* note 13, at 422. The arguments for a first amendment-based privilege are rooted in the doctrine that the framers of the Constitution intended to give the first amendment the "broadest possible scope." Bridges v. California, 314 U.S. 252, 265 (1941). Two principal lines of reasoning have evolved to support the privilege. First, there is a constitutionally protected right to gather news and since privileged communication fosters that news-gathering process, it is constitutionally protected. Branzburg v. Hayes, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

As Justice Stewart stated: "A corollary of the rights to publish must be the right to gather news. The full flow of information to the public guaranteed by the free-press guarantee would be severly curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated." *Id.* at 727 (Stewart, J., dissenting). Second, a privileged press is a constitutionally mandated "fourth" institution of government, provided for by the founding fathers as a checking device on potential abuses by other branches of government. Blasi, *The Checking Value in First Amendment Theory,* 1977 AM. B. FOUND RESEARCH J. 521, 527. Mr. Blasi notes that although the modern theory behind the first amendment concerns the protection of dissident groups and individuals in our society, the framers of the Constitution were more concerned with using the press to counter the inherent tendency of government officials to abuse the power entrusted to them. *Id.* at 538.

24. *See* Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958) (compelled disclosure of a journalist's confidential sources may constitute an abridgement of first amendment rights but such first amendment rights must yield to the public policy that all witnesses must testify).

25. *See, e.g., In re* Goodfadler, 45 Haw. 317, 367 P.2d 472 (1961) (other interests outweigh any constitutional rights); *In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963) (although state shield law protected journalist's privilege, court rejected first amendment argument).

The prevailing reason for the rejection of a privilege for journalists was that it would seemingly place the press above the law. J. BARRON & C. DIENES, *supra* note 13, at 525. *See also* State v. Buchanan, 250 Or. 244, 248, 436 P.2d 729, 731, *cert. denied,* 392 U.S. 905 (1968). The *Buchanan* court stated:

> [I]t would be difficult to rationalize a rule that would create special constitutional rights for those possessing credentials as news gatherers which would not conflict with the equal privileges and equal protection concepts also found in the Constitution . . . . We hold that there is no Constitutional reason for creating a qualified right for some, but not others, to withhold evidence as an aid to newsgathering.

250 Or. at 248-51, 436 P.2d at 731-32.

26. *See, e.g.,* Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969), *cert. dismissed per stipulation,* 402 U.S. 901 (1971) (in the absence of a statutorily based testimonial privilege, a journalist must reveal his sources before a court of law); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957) (no testimonial privilege under either FED. R. CIV. P. 26(b) or the Constitution).

United States Supreme Court first considered the issue in the landmark case of *Branzburg v. Hayes*.[27]

Branzburg, a reporter, was subpoenaed by a grand jury to answer questions which involved information that he had received from confidential sources while researching a news story.[28] Claiming a first amendment privilege, Branzburg refused to obey the trial court's order to disclose his sources.[29] On appeal, the Supreme Court, in a five to four decision, held that the criminal investigatory purpose of a grand jury was fundamental to effective law enforcement[30] and that the need for a grand jury to have the power to compel testimony was paramount to any first amendment rights of the reporter.[31] The *Branzburg* Court

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27. 408 U.S. 665 (1972). The cases decided with *Branzburg* were United States v. Caldwell, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972) and *In re* Pappas, 358 Mass. 604, 266 N.E.2d 797 (1971), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972). All three cases involved a reporter attempting to quash a subpoena ordering his appearance and/or testimony before a grand jury. *Id.* The motion to quash was denied in *Branzburg*. Branzburg v. Meigs, 503 S.W.2d 748 (Ky. Ct. App. 1971), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972). However, in *Caldwell*, the Ninth Circuit granted the motion, holding that a journalist need not appear before a grand jury absent a showing of compelling need for his presence. United States v. Caldwell, 434 F.2d at 1089.

For the reactions of various commentators to the *Branzburg* decision, *see* Goodale, *supra* note 12; Murvasky, *The Journalist's Privilege:* Branzburg *and Its Aftermath*, 52 TEX. L. REV. 829 (1974); Comment, *supra* note 12.

28. 408 U.S. at 668. Branzburg was a reporter for the Louisville Courier-Journal who had written two articles on drug use, one concerning the manufacture of hashish from marijuana in Jefferson County, and another about the "drug scene" in Franklin County, Kentucky. *Id.* In preparing both articles, Branzburg had witnessed the criminal production and use of illegal drugs, conduct which was the focus of the grand jury investigation. *Id.*

29. *Id.* at 667-69.

30. *Id.* at 686-90. The Court noted that the heart of Branzburg's argument was that "the burden on newsgathering resulting from compelling reporters to disclose confidential information outweighs any public interest in attaining that information." *Id.* at 681.

In response to Branzburg's claim, the Court noted that fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and a grand jury plays an important, constitutionally-mandated role in this process. 408 U.S. at 686-90.

31. 408 U.S. at 690. Although the Court recognized a first amendment interest in newsgathering, it did not afford much protection to that right. J. BARRON & C. DIENES, *supra* note 13, at 824-28. The Court's approach seemed to limit the first amendment interest to the personal privilege of the journalist as a citizen and overlooked the general societal interest in newsgathering. *See id.* The Court indicated its reluctance to create a special right for journalists, noting: "We are asked to create another privilege by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do." 408 U.S. at 690.

However, the majority did give some support to the idea that newsgathering is protected under the first amendment when it stated: "Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* However, the Court rejected the contention that the first

further stated that granting a qualified privilege to newsmen would be both impractical,[32] unhelpful,[33] and unduly burdensome to the task of a grand jury.[34]

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amendment guarantees the press "a constitutional right of special access to information not available to the public generally." *Id.* at 684, *citing* New York Times Co. v. United States, 403 U.S. 713, 728-30 (1971) (Stewart, J. concurring); Zemel v. Rusk, 381 U.S. 1, 16-17 (1965). *See* O'Brien, *Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication,* 26 VILL. L. REV. 1, 13-15 (1980).

32. 408 U.S. at 704-06. The Court concluded that the determination of who qualified as a member of the press and, consequently, who would be protected under a qualified privilege, would be extremely difficult to make. *Id.* Recognizing that the liberty of the press is the right of the lonely pamphleteer as much as it the right of the major newspaper, the Court noted that almost any person or group could claim a press privilege. *Id.* at 705. Thus, the courts would be embroiled in a preliminary determination needed to identify legitimate journalists, who qualified for the privilege, from "sham" journalists who claimed the privilege in order to avoid testifying. *Id.* This dilemma would place the courts in a situation which is perilously close to the licensing of journalists. J. BARRON & C. DIENES, *supra* note 13, at 431. *See also,* First Nat'l Bank v. Bellotti, 435 U.S. 735 (1980); Lowell v. Griffin, 303 U.S. 444 (1938) (the press in its historic connotation includes every vehicle of information dissemination).

33. 408 U.S. at 702. The court maintained that only the granting of an absolute privilege would resolve journalists' fears stemming from the possibility of compelled source disclosure. *Id.* Justice White stated: "If newsmen's confidential sources are as sensative as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it, is hardly a satisfactory solution to the problem." *Id.*

34. *Id.* at 701-02. The most important consideration persuading the Court not to require a preliminary showing of need before compelling disclosure, was the Court's view that the grand jury must be free to make its own determination of its need for evidence. *Id.* The Court reasoned that to play its role as an instrument of law enforcement, the grand jury must have ready access to every man's evidence. *Id.* In the Court's view, the grand jury must be able to proceed on the basis of tips, rumors or clues, and its examination of witnesses must not be obstructed by a requirement that it prove a compelling need for testimony whenever a newsman claims that his access to confidential sources would be jeopardized should he be compelled to testify. *Id.*

This view of the needs of the grand jury was essential to reconciling *Branzburg* with the established principle that government action must not infringe upon first amendment liberties any more than is necessary to accomplish a legitimate government purpose. *See, e.g.,* Elfbrandt v. Russel, 384 U.S. 11, 18 (1966); Freedman v. Maryland, 380 U.S. 51, 56, (1965). *See generally* Note, *Less Drastic Means and the First Amendment,* 78 YALE L.J. 464 (1969).

The *Branzburg* Court did hold that a journalist before a grand jury had some measure of protection. *See* 408 U.S. at 707. The Court stated:

> . . . [N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for the purpose of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash.

Id. at 707-08.

Mr. Justice Powell, in his pivotal concurring opinion,[35] mitigated the effect of the majority's holding by acknowledging the existence of a first amendment privilege but prescribing a case-by-case approach balancing the rights of the journalist and societal interests.[36] Mr. Justice Stewart, in his dissent,[37] argued that journalists did possess a qualified first amendment privilege[38] and articulated a three-pronged test which the government must satisfy before that privilege would be set aside in a particular case.[39]

As the lone Supreme Court decision directly addressing the issue of journalist privilege, *Branzburg* has been subject to widely varying interpretations by the lower courts[40] in both criminal[41] and civil

35. 408 U.S. at 709-10 (Powell, J., concurring). Justice Powell's concurring opinion in *Branzburg* was labeled "enigmatic" by the dissent. *Id.* at 725 (Stewart, J., dissenting). In a lecture at Yale Law School, Justice Stewart described the *Branzburg* decision as being "four and a half to four and a half, when reffering to Justice Powell's concurring opinion. Stewart, *Or of the Press,* 26 HASTINGS L.J. 631, 635 (1975).

36. 408 U.S. at 710. (Powell, J., concurring). Although Justice Powell was in favor of a case-by-case approach, he made clear that he did not accept the dissent's test which, in his view, would defeat and unduly subordinate "the essential societal interest in the detection and prosecution of crime." *Id.* at 710 n.* (Powell, J., concurring).

Justice Powell's test did not seem to place the burden of proof on either party; instead, the court would be free to balance the competing interests in a particular case. *See id.* at 710 (Powell, J., concurring).

37. *Id.* at 725 (Stewart, J., dissenting). Mr. Justice Stewart was joined in his dissent by Justices Brennan and Marshall. *Id.* Mr. Justice Douglas wrote a separate dissenting opinion in which he stated that the first amendment gave an absolute privilege to reporters. 408 U.S. at 712 (Douglas, J., dissenting).

38. *Id.* at 743 (Stewart, J., dissenting). The dissent found a qualified privilege followed as a matter of logic, once three predicates were recognized: 1) newsmen require informants to gather news; 2) confidentiality — the promise or understanding that names or certain aspects of communications will be kept off record — is essential to the creation and maintenance of a news-gathering relationship with informants; and 3) the possession by the grand jury of an unbridled subpoena power — unchecked by a constitutional right protecting confidential relationships from compulsory process — will either deter sources from divulging information or deter reporters from gathering and publishing information. *Id.* at 728 (Stewart, J., dissenting).

39. *Id.* at 743 (Stewart, J., dissenting). The dissent stated that in order to compel disclosure the government must: 1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of the law, 2) demonstrate that the information sought cannot be obtained by alternate means less destructive of first amendment rights; and 3) demonstrate a compelling and overriding interest in the information. *Id.*

40. *See* J. BARRON & C. DIENES, *supra* note 13, at 824-74; Goodale, *supra* note 12.

41. *See, e.g.,* United States v. Orsini, 424 F. Supp. 229 (E.D.N.Y. 1976), *aff'd,* 559 F.2d 1206 (2d Cir. 1977) *(Branzburg* holds that a journalist's first amendment rights must be balanced against the defendant's sixth amendment rights in a criminal trial); State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974) *(Branzburg* confined to grand jury proceeding, in other contexts first amendment rights should be balanced against the interests of the state).

Although *Branzburg* dealt solely with the question of journalist privilege in a grand jury context, Justice White, in dicta, indicated that the Court's

cases.[42] However, *Branzburg* has been almost uniformly followed by the lower courts in disallowing any claim to a journalist privilege in a grand jury proceeding.[43]

It is in the area of civil litigation that journalists' claims for a constitutional privilege have met with the most success.[44] The particular concerns involved in a criminal context – the need for law enforcement, possible social stigma or imprisonment, as well as the concern for a defendant's sixth amendment rights – are not factors in a civil case.[45] Thus, courts have been more willing to find first amendment rights paramount in civil cases.[46]

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holding was equally applicable to a criminal trial. *See* 408 U.S. at 670-91. The Court stated:

> [W]e perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on newsgathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the courts at a valid grand jury investigation or *criminal trial.*

Id. (emphasis added).

42. *See, e.g.*, Baker v. F.&F. Inv., 470 F.2d 778 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973) (*Branzburg* is strictly limited to grand jury proceedings and not dispositive in a civil proceeding); Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394 (D.D.C. 1973) (adoption of Justice Powell's balancing test in a civil action).

43. *See, e.g.*, Lewis v. United States, 517 F.2d 236 (9th Cir. 1975); *In re* Lewis, 501 F.2d 418 (9th Cir. 1974), *cert. denied,* 420 U.S. 913 (1975); *In re* McGowan, 298 A.2d 339 (Del. Super. Ct. 1972), *rev'd on other grounds,* 303 A.2d 645 (Del. 1973); Lightman v. State, 15 Md. App. 713, 294 A.2d 149 (Ct. Spec. App.), *aff'd,* 266 Md. 550, 295 A.2d 212 (1972), *cert. denied,* 411 U.S. 951 (1973); *In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3 (App. Div. 1972), *cert. denied,* 411 U.S. 951 (1973); *In re* WBAI-FM v. Proskin, 42 A.D.2d 5, 344 N.Y.S.2d 393 (1973); People by Fisher v. Dan, 41 A.D.2d 687, 342 N.Y.S.2d 731, *appeal dismissed,* 32 N.Y.2d 764, 298 N.E.2d 118, 344 N.Y.S.2d 955 (1973); Andrews v. Andreoli, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. 1977).

But see Bursey v. United States, 466 F.2d 1059, *rehearing denied,* 466 F.2d 1059 (9th Cir. 1972) (journalist appearing before a Grand Jury granted a qualified testimonial privilege).

44. Barron, *The Rise and Fall of a Doctrine of Editorial Privilege: Reflections on* Herbert v. Lando, 47 GEO. WASH. L. REV. 1002, 1007 (1979).

45. *See* J. BARRON & C. DIENES, *supra* note 13, at 452-54. An additional consideration was voiced in Carey v. Hume, 492 F.2d 631 (D.C. Cir.), *cert. dismissed,* 417 U.S. 938 (1974). The *Carey* court noted that:

> Justice White [in *Branzburg*] also relied on the various procedures available to prosecutors and grand juries to protect informants, and on the careful use by the government of the power to compel testimony. . . . Private litigants are not similarly charged with the public interest and may be more prone to seek wholesale and indiscriminate disclosure.

492 F.2d at 636 n.6.

46. A journalist's privilege to refuse to disclose his sources in civil cases arises in three principle contexts. J. BARRON & C. DIENES, *supra* note 13, at 452-53. First, a journalist who is not a party to a civil proceeding may be compelled by court order to give evidence. *Id.* Second, a journalist, as a party defendant in a civil proceeding, such as an action for defamation, may resist efforts by the plaintiff to force him to reveal the basis for his alleged defamation

The Third Circuit's decision in *Riley v. City of Chester*[47] illustrates the approach of many courts to the question of whether a journalist possesses an evidentiary privilege in civil litigation. The *Riley* court held that a journalist has a qualified evidentiary privilege, and that disclosure of a reporter's sources should be compelled only if the moving party satisfies three requirements.[48] Under *Riley,* the party seeking disclosure of a reporter's confidential source must: 1) have made an effort to obtain the information from other sources;[49] 2) have demonstrated that the information is only available through the journalist;[50] and 3) have proven that the information is relevant to his claim.[51] The court then determined that the trial court must balance on a case-by-case basis the policies underlying the privilege[52] against the need for the evidence sought to be obtained.[53]

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through discovery or in testimony at trial. *Id.* Finally, the journalist, as plaintiff in a civil proceeding, may resist efforts by the defendant to compel disclosure. *Id.*

47. 612 F.2d 708 (3d Cir. 1979). The plaintiff, Riley, was a former Chester policeman who was suing the Mayor and the Chief of Police of Chester for violations of his constitutional rights with respect to his freedom to conduct a campaign for Mayor. *Id.* at 710. During the trial, Riley called as a witness a reporter who had covered the mayoral campaign and questioned her about the source of her information. *Id.* at 711. The Third Circuit upheld the reporter's refusal to disclose her source and articulated a three-pronged test which the moving party must satisfy before the court would compel the journalist to disclose a source. *Id.* at 717. For a discussion of this test, *see* notes 49-53 and accompanying text *infra.*

48. 612 F.2d at 716. These requirements are in essence the three-pronged test articulated by Justice Stewart in his dissent in *Branzburg. See* note 39 *supra.*

49. 612 F.2d at 717, *citing* Gilbert v. Allied Chem. Corp., 411 F. Supp. 505, 510 (E.D. Va. 1976).

50. 612 F.2d at 717, *citing* Zerilli v. Bell, 458 F. Supp. 26, 29 (D.D.C. 1978).

51. 612 F.2d at 717, *citing* Gulliver's Periodicals, Ltd. v. Charles Levy Circulating Co., 455 F. Supp. 1197, 1204 (N.D. Ill. 1978).

52. 612 F.2d at 715-16. The *Riley* court placed great emphasis on the need to protect the vital role played by the press in a free society. *Id.* at 715. Addressing the need to encourage and protect the newsgathering process, the court stated:

> We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely that important information, tips and leads, will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully* and *completely* protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.

Id., quoting In re Taylor, 412 Pa. 32, 40, 193 A.2d 181, 185 (1963) (emphasis in original).

53. 612 F.2d at 716-18. The court distinguished *Riley* from other cases where a reporter has been compelled to testify by noting that *Riley* presented "simply a situation where a journalist has been called as a witness in a civil suit

Although it is arguable that the journalist's privilege articulated in *Riley* was valid only in the context of a civil action,[54] the Third Circuit in *United States v. Cuthbertson*[55] held that the same balancing test would be applied to all cases, criminal or civil,[56] in which the question

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in which neither she nor her employer has any personal interest." *Id.* at 716. The court then found that "under the circumstances, plaintiff must demonstrate why his interest in civil litigation . . . , is dependent upon the information sought." *Id.*

In fitting the specific facts of *Riley* into its test for compelling disclosure, the court determined that a number of factors precluded a conclusion that the journalist's testimony was necessary. *Id.* at 717. The court emphasized three factors in making this determination. *Id.* First, the journalist was the first witness to testify other than the plaintiff and there were other available witnesses who were much more likely to have either been the source of the reporter's information, or to have knowledge of the source. *Id.* Second, the defendant, Battle, was the admitted source of much of the information in the news story and was the likely source of the journalist's story, but wasn't questioned. *Id.* Third, and most importantly, the court determined that the information sought was of little relevance to the plaintiff's case since the news story referred to investigations completed long before the election began and the plaintiff's theory in the case involved the defendant's attempts to sabotage the election. *Id.* at 717-18. The court refused to compel the reporter to reveal her source. *Id.* at 718.

54. 612 F.2d at 716. The *Riley* court stated that: "Such a case-by-case analysis [of the reporter's privilege] is mandated even more in civil cases than in criminal cases, for in the former the public's interest in casting a protective shroud over the newsmen's sources and information warrants an even greater weight than in the latter." *Id., quoting* Altemose Constr. Co. v. Building & Constr. Trades Council, 443 F. Supp. 489, 491 (E.D. Pa. 1977). For a discussion of the different considerations involved in determining a reporter's privilege in a civil action, *see* notes 44-46 and accompanying text *supra.*

55. 630 F.2d 139 (3d Cir. 1980). *Cuthbertson* involved a grand jury probe into the franchising activity of Wild Bill's Family Restaurants whose alleged illegalities were uncovered during investigations by the Columbia Broadcasting System's (CBS) news program 60 MINUTES. *Id.* at 142. The defendants sought discovery of 60 MINUTES notes, memoranda, reports, and documents of any kind relevant to their defense. *Id.* at 142-43. The trial court held that the Third Circuit's ruling in *Riley* was controlling and that CBS had a qualified privilege to the confidentiality of its sources, even though the prosecution had obtained waivers of the privilege from the witnesses in question. *Id.* at 143. The court was of the opinion that this privilege would only yield if the defendants could prove a need for the information sought, under the test articulated in *Riley. Id.* The court concluded that it could not make this determination without seeing the information which was in CBS' possession. *Id.* Therefore, the court ordered CBS to furnish the information to the court for an in camera review. *Id.* CBS refused to comply with the court's order, claiming a qualified privilege and was cited for civil contempt of court. *Id.* at 143-44. CBS appealed the contempt citation. *Id.*

56. *Id.* at 146-47. The court stated:

> Although *Riley* did not consider the existence of a qualified privilege in a criminal case, we find it to be persuasive authority in this case.
>
> First the interests of the press that form the foundation for the privilege are not diminished because the nature of the underlying proceeding out of which the request for the information arises is a criminal trial. CBS' interest in protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-

of journalist privilege arose.[57]

Despite the trend in most courts toward the recognition of a qualified journalist privilege,[58] some doubt exists as to the eventual position of the Supreme Court, particularly in light of the Court's recent decision in *Herbert v. Lando*.[59] In this libel action against a journalist, the Court held that there is no absolute editorial privilege to withhold prepublication notes and memoranda of the journalist from discovery.[60]

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censorship created by compelled disclosure of sources and unpublished notes does not change because a case is civil or criminal.

Id.

The court further stated that the constitutional rights of the defendants to a fair trial do not always prevail over the first amendment rights underlying the reporter's privilege. *Id.* at 147. Finding that a defendant's sixth amendment and due process rights "are not irrelevant," the court nonetheless determined that these rights are only important factors to be considered in the balancing process when determining the existence in any particular case of a reporter's privilege. *Id.*

The court also held that the privilege extends beyond the protection of confidential sources and precluded the compelled production of any reporter's resource materials. *Id.* Reasoning that the foundation for a reporter's privilege is the public policy favoring the free flow of information to the public, the court concluded that any significant intrusion into the newsgathering and editorial process was prohibited by the privilege. *Id.*

57. *Id.* at 146-47. As the only issue before the court in *Cuthbertson* was whether the defendant must make a preliminary showing of need before the trial court can order an in camera review, the Third Circuit did not give a detailed analysis of the test for disclosure within the factual situation before the trial court in *Cuthbertson*. However, the Third Circuit did hold that the defendant must make a preliminary showing that the information sought was relevant evidentiary material and was not available from another source. *Id.* at 148-49. The court determined that the defendants had satisfied the prelimianry requirements and affirmed the contempt citation. *Id.* at 149.

The court summarily dismissed the argument that the testimonial privilege and corresponding right to confidentiality of sources was waived when the 60 MINUTES informants agreed to testify for the government and consequently revealed themselves to the defendants. *Id.* at 147. Analogizing the newsmen's privilege to the attorney-client privilege, the court held that the journalist privilege belonged to the journalist and could only be waived by its holder *Id.* The Third Circuit has subsequently reaffirmed its position in *Cuthbertson* and, incidentally its result in *Criden*, in a subsequent opinion in the *Cuthbertson* case. *See* United States v. Cuthbertson, Nos. 81-1467, 81-1470 & 81-1485, slip op. at 13-4 (3d Cir. May 29, 1981).

58. Barron, *supra* note 44, at 1007.

59. 441 U.S. 153 (1979). *See generally* Barron, *supra* note 44; Bezanson, Herbert v. Lando, *Editorial Judgement, and Freedom of the Press: An Essay*, 1978 U. ILL. L.F. 605 (1978).

60. 441 U.S. at 173-75. In *Herbert*, the Court determined that no editorial privilege should be created that would prevent discovery of matters that might show actual malice on the part of a media libel defendant in an action brought by a public figure plaintiff. *Id.* at 169-73. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The *New York Times* Court held that a public figure plaintiff in a libel action is required to prove "actual malice" on the part of the press in order to recover. *Id.* at 279-83. The doctrine of actual malice requires proof that the journalist published a false statement about the plaintiff in reckless disregard of the truth. *See* RESTATEMENT (SECOND) OF TORTS § 580-A, comment d (1977). The decision by the Court in *Lando* was an accommodation to

However, while the *Lando* Court made no mention of a balancing test, the Court implicitly acknowledged a weighing of competing interests, noting that "evidentiary privileges are not favored, and even those rooted in the constitution must give way in the proper circumstances." [61]

It was against this background that the Third Circuit in *Criden* addressed the issue of whether the first amendment permits a journalist, called as a defense witness in a criminal proceeding, to refuse to affirm or deny that she had a conversation with a self-avowed source where the conversation is arguably relevant to the credibility and motivation of that source.[62] Judge Aldisert, writing for the majority, found that the

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New York Times v. Sullivan because the Court was of the opinion that there is no way to prove actual malice without having access to prepublication thoughts and notes of the reporter. *See* Barron, *supra* note 44, at 1013.

The question of whether a newspaper or reporter has an editorial privilege — the right to withhold prepublication or unpublished documents, notes, and films — usually arises in a civil context, but can arise in a criminal trial or in a grand jury proceeding. *See, e.g.,* United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980) (distinction between editorial and testimonial privilege is blurred in the case where names of confidential informants were located on documents and films in possession of the editorial staff of a newsprogram). One court has found that the right to an editorial privilege follows from a journalist's testimonial privilege. Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977), *rev'd,* 441 U.S. 153 (1979). Unlike the journalist's testimonial privilege, which emanates from the press' claim to a constitutional right to gather news, the argument for an editorial privilege arises from the press' claim of an uninhibited constitutional right to publish. *See* Barron, *supra* note 44, at 1009. However, both privileges involve similar considerations of a first amendment clash with other societal interests.

61. 441 U.S. at 175. The Court has been recently subject to petition by the organized, institutional press to grant it special status deriving from a modern interpretation of the first amendment. *See, e.g.,* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (challenge to "gag order" by institutional media); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (challenge by newspapers to state "right to reply" statute); New York Times Co. v. United States, 403 U.S. 713 (1971) (publication of the Pentagon Papers by the organized press); Pennekamp v. Florida, 388 U.S. 331 (1946) (Cartoons and editorials criticizing a Florida trial court did not present a clear and present danger to the integrity of the court).

For a discussion of problems associated with the evolution of the corporate press, *see* notes 101-09 and accompanying text *infra.*

62. 633 F.2d at 348. The court first disposed of arguments presented by both the defense and the government which would have mooted the question of journalists' privilege and found that the constitutional issue must be confronted. *Id.* at 350-54. The appellant had argued that the contempt proceeding was moot because the pretrial record was closed. *Id.* at 351. As the record was closed, Schaffer argued that her testimony was no longer needed, and consequently, the reason for the contempt citation had dissipated. *Id.* However, the Third Circuit noted that the trial court had retained an option to open the pretrial record and rejected this argument. *Id.* The court further noted that, contrary to the appellant's claim, a civil contempt order does implicate the court's integrity, and therefore a ruling on the contempt order was necessary in order to uphold the authority of the court. *Id.* at 351-53.

The court, citing the deeply rooted doctrine that federal courts ought not to decide questions of constitutionality unless adjudication is unavoidable, next confronted the government's argument that the appeal of the contempt order was immaterial because the appellant's answer to the question would not have

case highlighted a tension between first, fifth and sixth amendment rights.[63] The court noted the numerous Supreme Court decisions expressing the importance of the first amendment[64] and, relying upon *Riley*,[65] determined that "journalists have a federal common law privilege, albeit qualified, to refuse to disclose their confidential sources."[66]

The court found that the only issue before it was whether the district court's contempt order comported with the Third Circuit's decision in *Riley*.[67] Applying the *Riley* three-pronged test,[68] the court

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produced the kind of evidence necessary to justify a dismissal of the indictment. *Id.* at 352. While noting that such an argument was facially appealing, the court nonetheless felt that the defendants must be allowed an opportunity to prove their allegations of outrageous prosecutorial misconduct. *Id.* at 354-55.

63. 633 F.2d at 355, *citing* Branzburg v. Hayes, 408 U.S. at 710 (Powell, J., concurring). The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. Judge Aldisert noted that the sixth amendment requires that in all criminal prosecutions, the accused shall have compulsory process for obtaining witnesses, and the fifth amendment guarantees that he shall not be deprived of life, liberty, or property without due process of law. 633 F.2d at 355.

The opinion then noted that the precise text of the Constitution was inadequate for a decision and that the court must look to the gloss added to the Constitution by various Supreme Court decisions. *Id.*

64. 633 F.2d at 355, *citing* Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814, 2825 (1980) (reporters are viewed as surrogates for the public); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (first amendment is bottomed on a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open); Roth v. United States, 354 U.S. 476, 484 (1957) (first amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people).

65. For a discussion of *Riley, see* notes 47-53 and accompanying text *supra.*

66. 633 F.2d at 355. The court also found that common sense reasons for keeping sources confidential also underlie the necessity of a journalist privilege. *Id.* at 355-56. Noting that in certain sectors of society information flows more freely when from anonymous sources, the court stated that "the rule protecting a journalist's source does not depart significantly from daily experience in informal dissemination of information." *Id.* at 356.

67. *Id.* at 358. For a discussion of *Riley, see* notes 47-53 and accompanying text *supra.* The court made clear that the *Riley* test is utilized to determine under what circumstances a journalist will lose his qualified privilege to refuse to name a source. 633 F.2d at 658. However, the court explicitly pointed out that the case at hand did not involve a question of source disclosure, as Schaffer was only required to confirm or deny that she had a conversation with Vaira. *Id.* The court acknowledged the case presented the implicit question of whether Schaffer would be required to reveal the substance of her conversation with Vaira, omitting portions that explicitly identify other sources. *Id.*

68. 633 F.2d at 358. The court noted that before it should apply the balancing test, the moving party must first show that he had attempted to obtain the information from other sources. *Id.* Unlike *Riley, Criden* did not involve the compelled disclosure of a reporter's source but merely the confirmation by a reporter of a voluntarily disclosed self-confessed source. *Id.* For the exact question which Schaffer refused to answer, *see* note 7 *supra.*

Observing that the question of whether to compel a reporter to reveal her source involved a more stringent application of the *Riley* test than was needed under the circumstances in *Criden,* where the reporter was asked merely to

concluded that the defendants had demonstrated that: 1) they had attempted to obtain the information from other sources; [69] 2) there was no other source from which to obtain the information; [70] and 3) the information was relevant and important to their defense.[71] Consequently, the court affirmed the district court's contempt citation.[72]

The majority noted that its holding was limited to the question of whether Schaffer would be compelled to confirm Peter Vaira's testimony that he had a conversation with her concerning ABSCAM.[73] The court explicitly pointed out that it made no ruling on whether Schaffer would ultimately be compelled to reveal her source or sources should the defense seek such a disclosure.[74]

Although recognizing that, under *Cuthbertson*,[75] Vaira's admission did not constitute a waiver of Schaffer's own qualified privilege not to

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confirm prior testimony, the court held that the movant in *Criden* had a lesser burden of proof than the movant in *Riley*. 633 F.2d at 358.

The court summarized the *Riley* test by stating: "In striking the delicate balance between the assertion of the privilege on the one hand and the interest of either criminal or civil litigants seeking the information, the materiality, relevance and necessity of the information must be shown." *Id., quoting* Riley v. City of Chester, 612 F.2d at 716.

69. 633 F.2d at 358-59. The court noted that prior to calling Schaffer as a witness, the defendants had called Vaira as a witness and also sought release of "The Blumenthal Report," a Department of Justice investigation into the source of the ABSCAM leaks. *Id.* at 359. More importantly, after having noted the unresolved questions in Vaira's testimony, the court concluded that the defendants' next logical step was to call Schaffer. *Id.*

70. *Id.* The court found that the sole purpose of Schaffer's testimony was to "shed light on Vaira's motivations in disclosing certain information to her," and on his credibility. *Id.* The only person able to testify on these points was Schaffer. *Id.* Consequently, the court concluded that "defendants quite clearly have no other source from which they can acquire this insight." *Id.*

71. *Id.* Observing that the defendants were attempting to prove outrageous prosecutorial conduct sufficient to warrant dismissal, the court found answers to the questions of Vaira's motivation and credibility were crucial to the defense's case. *Id.* The court recognized that the defendants might fail to prove prosecutorial misconduct but held that Schaffer's testimony was important to their attempt.

72. *Id.* at 360.

73. *Id.* at 359. Schaffer argued that if she testified that Vaira did not speak to her, and thus was not the source of her information, the subsequent line of questions would seek the disclosure of her actual sources. *Id.* The court dismissed this argument by noting that the district court had declared that there would be no additional sources revealed and that it would rule on a question-by-question basis on the permissibility of the defendants' questions. *Id.*

74. *Id.* at 360. The court stated: "Schaffer is to disclose not the source of any information but the contents of a conversation from a named declarant who has already testified under oath what he said to her." *Id.*

The *Criden* court had previously ruled that the compelled disclosure of a confidential source would require a stricter application of the *Riley* test than was needed on the facts before it in *Criden*. *Id.* at 358. Thus, in the court's view, future disputes including possible source disclosure, would be resolved under the *Riley* test. *Id.* at 359.

75. For a discussion of *Cuthbertson, see* notes 55-57 and accompanying text *supra*.

reveal her nonpublished recollections of their conversation,[76] the court found that Schaffer's privilege must yield in this case to the defendant's demonstrated need for the material.[77]

Judge Rambo, in her concurring opinion, noted that the most cogent argument for the recognition of a journalist privilege is that it encourages the free flow of information by guaranteeing confidentiality.[78] Therefore, Judge Rambo reasoned that the rationale underlying the privilege disappears when, as in *Criden,* the confidant willingly identifies himself and thereby destroys all expectation of confidentiality.[79] Consequently, Judge Rambo found the majority's opinion to be an unjustified extension of the qualified privilege recognized in *Riley.*[80]

It is submitted that both the societal interests and the factual situation before the Third Circuit in *Criden* were analogous to those before the Supreme Court in *Branzburg.*[81] Each case involved a reporter's claim to a first amendment right to withhold the source of his information while testifying in a criminal proceeding.[82] However, the *Criden* court found the precedent set in *Riley,* a Third Circuit civil case, to be dispositive.[83] While the full implications of *Branzburg* are yet to be developed,[84] it is submitted that *Branzburg* provides a sounder basis for a decision on journalist privilege within the context of a criminal trial

76. 633 F.2d at 359-60. The court found that, as in *Cuthbertson,* the testimonial privilege belonged to the journalist — Schaffer — and not to the source — Vaira. *Id.* at 359. However, the court noted that Vaira's admission that he was the source of Schaffer's information was relevant to the balancing of interests test. *Id.* at 360.

77. *Id.* at 360.

78. 633 F.2d at 360-61 (Rambo, J., concurring). By holding that journalists have a testimonial privilege for the confidentiality of their sources, in spite of the "confidential source" being self-revealed, Judge Rambo noted that the Third Circuit in *Criden* was merely following its decision in *Cuthbertson. Id.* However, Judge Rambo objected to *Cuthbertson* on the same grounds that she objected to *Criden. Id.* In discussing her reasons the judge stated:

> Rather than split hairs over when the question put to a newsman seeks the identity of a confidential source or looks only to the source's motivation, I would look to the present state of the expectation of confidentiality. If that expectation no longer exists, I would hold that the privilege no longer exists.

Id. at 361 (Rambo, J., concurring). For a discussion of the Third Circuit's decision in *Cuthbertson, see* notes 55-57 and accompanying text *supra.*

79. 633 F.2d at 361. (Rambo, J., concurring).

80. *Id.*

81. For a discussion of the factual situation in *Criden, see* notes 4-11 and accompanying text *supra.* For a discussion of the factual situation in *Branzburg, see* notes 27-31 and accompanying text *supra.*

82. *Id.*

83. *See* 633 F.2d at 358; notes 67-72 and accompanying text *supra.*

84. J. BARRON & C. DIENES, *supra* note 13, at 438. For a discussion of the various interpretations given to *Branzburg, see* notes 40-43 and accompanying text *supra.*

than does *Riley*.[85] Yet, the *Criden* majority, by applying the *Riley* test, which is essentially the same test proposed by Justice Stewart in his dissenting opinion in *Branzburg*,[86] totally ignored the rule of law decided in *Branzburg*.[87]

With regard to the use of the balancing test in the application of the journalist privilege to the present case, it is further submitted that the *Criden* court did not fully consider the policy underlying the creation of the privilege [88] and, as a consequence, was insensitive to the unique factual situation in *Criden*.[89] The most cogent arguments in favor of a journalist privilege emanate directly from a first amendment protected interest in newsgathering.[90] Confidentiality of sources encourages informants to give information and, consequently, aids the press in its newsgathering function.[91] More so than other relationships in which confidentiality is protected, *e.g.*, attorney-client, or physician-patient, where the privilege is created to protect the individual,[92] the journalist privilege is not primarily intended to protect the informant or the newsman but rather to create conditions where the news can

85. *See* note 43 and accompanying text *supra*. It is submitted that at the very least, *Branzburg* provides clear guidance with respect to a journalist's privilege before a grand jury. *Id.* Mr. Justice White said in his *Branzburg* opinion: "The sole issue before us is the obligation of reporters to respond *to grand jury* subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." 408 U.S. at 682 (emphasis added).

Justice Powell's concurring opinion specifically criticized the qualified privilege proposed by Justice Stewart because he felt it placed too heavy a burden of justification on the government and consequently, would hinder the legitimate performance of the grand jury. 408 U.S. at 710 n.* (Powell, J., concurring).

86. *Compare* notes 48-53 and accompanying text *supra with* notes 39 *supra*. The *Branzburg* court held that a journalist before a grand jury had no special testimonial privilege. *See* note 31 *supra*.

In contrast, the *Criden* court granted a qualified testimonial privilege to newsmen appearing before a grand jury and the party objecting to the privilege was required to show cause as to why it should give way. *See* note 66 and accompanying text *supra*.

87. *See* notes 30-34 and accompanying text *supra*.

88. *See* note 23 *supra*.

89. *See* note 7 *supra*.

90. *See* note 30 *supra*.

91. *See* note 66 *supra*.

92. *See* notes 15-17 and accompanying text *supra*. Wigmore notes that the policy behind the attorney-client privilege is to promote freedom of consultation between legal advisors and their clients. J. WIGMORE, *supra* note 12, at 545. Although society does receive some indirect benefits from the free flow of information between attorney and client, the privilege exists to foster the accessibility of legal counsel for individuals. *See id.* Unlike the situation in an attorney-client relationship, where the individual is compelled to talk to an attorney in order to receive fair treatment in the courts, the informant involved in a journalist's privilege voluntarily seeks out the newsman, or at least is not compelled by the threat of any personal adverse consequences. In addition, when an indvidual gives information to a journalist, he is seeking publication of the information, not the maintenance of its confidentiality.

reach the public.[93] It is submitted, therefore, that while exercise of the privilege may be personal to the journalist, the underlying rationale of the privilege is based on societal interests.[94] Consequently, where either of the parties breaks the confidence, as was the situation in *Criden,* the privilege no longer serves to facilitate this broad societal interest of dissemination of information. With the underlying rationale gone, to grant the privilege gives the journalist more rights than other members of society.[95] As the *Criden* court noted, "the rule follows where its reason leads; where the reason stops, there stops the rule."[96]

The most immediate impact of *Criden* is that it standardizes through its balancing test the treatment of journalists' privilege in both criminal and civil contexts.[97] However, in so doing, the *Criden* court has given impetus to the notion that the press, and those who claim status as members of the press, have acquired legal rights beyond those of ordinary citizens.[98] The American press has flourished for over two

93. *See* Branzburg v. Hayes, 408 U.S. at 690. It is further submitted that even without any historical constitutional protection for informants, the press has flourished. *Id.* at 698-99. As the *Branzburg* court stated: "The existing constitutional rules have not been a serious obstacle to either the development or the retention of confidential news sources by the press." *Id.* at 699.

94. *See* note 102 *infra.*

95. *See* note 25 *supra;* note 162 *infra.*

96. 663 F.2d at 356, *citing* United States v. Schreiker, 599 F.2d 534, 537 (3d Cir. 1979).

97. For a discussion of the differences between *Branzburg* and *Criden, see* note 87 *supra.*

98. *See* First Nat'l Bank v. Bellotti, 435 U.S. 735, 795 (1978) (Burger, C.J., concurring). Chief Justice Burger recently asserted that the free press clause does not support a preferred, institutional press position because the colonial concept of freedom of the press did not contemplate limiting that freedom to any one group. *Id.* at 798-99 (Burger, C.J., concurring). Rejecting the argument that the founding fathers must have intended a preferred press, or else the free press clause is merely a reiteration of the free speech clause, Chief Justice Burger concluded that freedom of speech protects the expression of ideas and beliefs while the freedom of the press protects the broad, permanent dissemination of those ideas and beliefs. *Id.* at 799-800 (Burger, C.J., concurring). The Chief Justice further noted that most pre-first amendment commentators employed the term "freedom of speech" synonymously with "freedom of the press." *Id., citing* L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 174 (1960).

The characterization of the press may be approached along two lines. Lange, *supra* note 13, at 98-103.

The "structural" approach requires a determination of who belongs to the organized, "official" press, and therefore involves making distinctions between the certified journalist and lone pamphleteer. *Id.* at 100. The functional approach, however, requires defining the press in terms of the function it performs, *i.e.* providing information. *Id.* at 102. As such, the freedom of the press would be a personal right. *See* Lowell v. Griffin, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion").

It is submitted that while traditional constitutional doctrine holds that the freedom of the press is a fundamental personal right, creating an institutional press involves difficulties of determining who is a member of the press. *See* note 32 *supra.*

hundred years under the protective gaze of the first amendment, and has done so without any preferred institutional status.[99] However, over the years, the press has constantly clamored for special rights and privileges,[100] but until the advent of the corporate media, had achieved little success.[101] The constitutional theory underlying the first amendment is that it gives personal and not institutional rights.[102] As such, *Criden* is a step toward a new definition of the press which affords it exclusive privileges and unjustifiably destroys the egalitarian design of the Constitution.[103]

On a more concrete level, by requiring a specific showing of need before a journalist can be compelled to reveal his sources, the *Criden* decision should mitigate the press' oft cited fear that the government can go on a "fishing expedition" [104] or use the press as an investigatory tool for law enforcement.[105] However, the trade-off is that the legitimate needs of unpopular criminal defendants in highly publicized and politically sensitive trials could easily be disrupted by a reporter's claim of confidentiality.

The Third Circuit in *Criden* has taken the position of Justice Stewart in his *Branzburg* dissent.[106] However, the actual effect upon the relationship between the reporter and his confidential source will be minimal. The reporter cannot absolutely promise his source that

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99. *See* Barron, *supra* note 44, at 1003-06. Professor Barron notes that there is a movement to give a special constitutional status to the press. *Id.* at 1007. In this view, the first amendment is not a mandate that the freedom of the press is protected, but that the press shall be free from the law. *Id.*

Mr. Justice Stewart in his celebrated lecture at Yale Law School articulated the idea that the press clause of the Constitution confers unique protection on the press in a way that is superior to the rights afforded to the general population by the free speech clause. *See* Stewart, *supra* note 35.

The theory that the free press clause created a preferred institutional press arises from two fundamental propositions: 1) the free press clause effects a separation of the press from the government and government interference; and 2) the rights of the press derive from its institutional status and not from any obligation to inform the public. Bezanson, *supra* note 13.

Despite the movement toward a preferred press, the Supreme Court has never squarely faced the issue. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 798 & n.3 (1978) (Burger, C.J., concurring).

100. *See* Branzburg v. Hayes, 408 U.S. at 682-85.

101. For a discussion of the various cases where the institutional press has petitioned the Supreme Court for special status, *see* note 61 *supra.*

102. *See* Pennekamp v. Florida, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring) ("The purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will, as well as to utter it. . . . The liberty of the press is no greater and no less . . . than the liberty of every citizen of the republic").

103. *See* notes 98 & 102 *supra.*

104. *See* Branzburg v. Hayes, 408 U.S. at 744 n.34 (Stewart, J., dissenting).

105. *Id.*

106. *Compare* note 39 *supra with* notes 67-71 and accompanying text *supra.*

there will be no legal compulsion to breach the vow of confidence.[107] In the final analysis, a reporter knowing the limitations of his privilege, must be careful not to overstep its bounds, and if he promises more than he can safely deliver, he must bear the burden.[108]

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107. 633 F.2d at 359-60. The only way a reporter could be completely sure that there would be no legal compulsion to reveal his sources would be if reporters were granted an absolute privilege. 408 U.S. at 702 n.39.

108. The American Newspaper Guild's Code of Ethics includes the following canon: "That newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigatory bodies . . . " D'Alemberte, *supra* note 12, at 315.

It would thus appear, barring the adoption of an absolute privilege, that journalists will continue to face confrontation with the contempt powers of governmental bodies should they adhere to their own code of ethics. J. BARRON & C. DIENES, *supra* note 13, at 414.

CONSTITUTIONAL LAW—POSTJUDGMENT GARNISHMENT—PENNSYLVANIA'S POSTJUDGMENT GARNISHMENT PROCEDURES VIOLATE THE DUE PROCESS AND SUPREMACY CLAUSES.

Finberg v. Sullivan (1980)

Sterling Consumer Discount Co. (Sterling) obtained a default judgment against Beatrice Finberg (Finberg) [1] in the Court of Common Pleas for Philadelphia County.[2] Sterling immediately moved to execute on the judgment pursuant to Pennsylvania's postjudgment garnishment procedures.[3] Consequently, Finberg's checking and savings accounts [4] were attached,[5] despite the fact that the monies deposited in these accounts were funds entirely exempt from attachment and garnishment under both state and federal law.[6]

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1. Finberg v. Sullivan, 634 F.2d 50, 51 (3d Cir. 1980) (en banc). The plaintiff, Beatrice Finberg, is a 68 year-old widow whose only source of income was social security benefits; she was sued by Sterling to enforce a debt. *Id.*

2. Sterling Consumer Discount Co. v. Finberg, No. 5678 (C.P. Phila. Cty. Oct. 25, 1977). *See* Finberg v. Sullivan, 461 F. Supp. 253, 255 (E.D. Pa. 1978), *vacated and remanded,* 634 F.2d 50 (3d Cir. 1980) (en banc).

3. *See* PA. R. CIV. P. 3103, 3108(d), 3111, 3140(a). [The Pennsylvania Rules of Civil Procedure are codified at Title 42, PA. CONS. STAT. ANN.] Sterling initiated the garnishment proceedings by filing a praecipe for a writ of execution with the Prothonotary of Philadelphia County. 461 F. Supp. at 255. *See* PA. R. CIV. P. 3103(a). The writ named Finberg as the defendant and Philadelphia National Bank (PNB) as the garnishee. 461 F. Supp. at 255. The writ was transmitted to the Sheriff of Philadelphia County pursuant to rule 3103(e). *Id.* Service of the writ was made to PNB on Nov. 3, 1977 pursuant to rules 3108 and 3111. *Id.* The next day, a copy of the writ was forwarded by PNB to Finberg in accordance with rule 3140(a) and was received by Finberg on Nov. 7, 1977. *Id.* at 255. On Nov. 18, 1977, a copy of PNB's response to Sterling's interrogatories was furnished to Finberg as required by rule 3140(b). *Id.* For a discussion of the distinctions between attachment and garnishment, *see* note 5 *infra.*

4. 634 F.2d at 52. The accounts held a total of $550, all of which represented social security benefit payments. *Id.* The accounts were held by PNB. 461 F. Supp. at 255.

5. The *Finberg* court distinguished garnishment from attachment. 634 F.2d at 52 n.1. Garnishment was defined as the entire "process of execution against property held by someone other than the debtor." *Id.* In *Finberg,* Sterling initiated a garnishment of the bank accounts that Finberg maintained at PNB in order to execute its judgment against Finberg. *Id.* at 52. Attachment was defined as "the seizure imposed on property held by a garnishee at the beginning of the garnishment process." *Id.* at 52 n.1. After the garnishment proceedings were initiated, service of a writ of execution was made on PNB. *Id.* at 52. This service had the effect of enjoining PNB from making any payments out of Finberg's accounts. *Id.* For a discussion of the Pennsylvania Rules of Civil Procedure involved in this process, *see* note 3 *supra.*

6. 634 F.2d at 52. Two exemptions were applicable to Finberg: the Social Security Act exemption, 42 U.S.C. §§ 301-1399, 407 (1976); and the $300 general

Finberg encountered difficulties in having the exempted funds released from attachment because of the delay encountered in obtaining court orders for the release, taking depositions for trial, and securing the final release of funds by the garnishee.[7] As a result of these difficulties and delays, Finberg brought a class action [8] seeking a declaratory judgment that Pennsylvania's postjudgment garnishment procedures were unconstitutional under the due process [9] and supremacy clauses.[10] On appeal from the district court order granting summary judgment for the defendant,[11] the United States Court of Appeals for the Third

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exemption under Pennsylvania law. PA. STAT. ANN. tit. 12, § 2161 (Purdon 1967), *revised and codified* at 42 PA. CONS. STAT. ANN. § 8123 (Purdon 1979). The Social Security Act, provides that "none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process . . . ." 42 U.S.C. § 407 (1976). Because Finberg's bank accounts contained social security payments, they were exempt from execution under the Social Security Act. *Id.* §§ 301-1399 (1976). In addition, Pennsylvania law grants a $300 exemption to a class of debtors which includes Finberg. PA. STAT. ANN. tit. 12, § 2161 (Purdon 1967), *revised and codified* at 42 PA. CONS. STAT. ANN. § 8123 (Purdon 1979). For a discussion of why the Third Circuit found the procedures which allowed the attachment of exempt funds to be unconstitutional, *see* notes 67-91 and accompanying text *infra.*

7. 634 F.2d at 52. Having received no notice that her accounts, attached on Nov. 3, 1977, might be exempt from garnishment, Finberg filed a petition in the court of common pleas on Nov. 18, 1977, in order to claim her exemption. *Id.* Consequently, on Dec. 8, recognizing the Pennsylvania exemption, the court released $300 of Finberg's funds from the attached account. *Id., citing* 42 PA. CONS. STAT. ANN. § 8123 (Purdon 1979). *See* note 6 *supra.* On April 11, 1978, after Finberg's deposition was taken to determine the basis of her claimed social security exemption, Sterling agreed to release the remaining $250 in Finberg's accounts. 634 F.2d at 52. *See* 42 U.S.C. § 407 (1976); note 6 *supra.* The court ordered the release on April 25, 1978. *Id.* Finally, on May 30, 1978, PNB released $226.50, retaining $23.50 as a service charge to cover its expenses resulting from the garnishment. 461 F. Supp. at 255.

8. 461 F. Supp. at 255-56. The complaint sought relief for Finberg and for two classes of similarly situated plaintiffs. *Id.* The present action named Sterling, John A. Sullivan, Sheriff of Philadelphia County, and Americo V. Cortese, Prothonotary of Philadelphia County as defendants. 634 F.2d at 52. For a discussion of the roles of defendants Sterling and Sullivan in the instant case, *see* note 3 *supra.*

9. 634 F.2d at 52-53. The due process clause of the fourteenth amendment provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

10. 634 F.2d at 52-53. The supremacy clause states that: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the Supreme Law of the Land; . . . ." U.S. CONST. art. VI.

11. 461 F. Supp. at 263. Specifically, the district court granted the defendant's motion for summary judgment on each of the declaratory judgment claims and denied class certification. *Id.* at 257, 263. However, the court awarded Finberg $23.50 plus interest against defendant Sterling. *Id.* at 263. This amount had been retained by PNB as a service charge. *Id. See* note 7 *supra.*

Circuit, sitting en banc,[12] vacated[13] and remanded, *holding* that Pennsylvania's postjudgment garnishment procedures were violative of both the due process and the supremacy clauses. *Finberg v. Sullivan,* 634 F.2d 50 (3d Cir. 1980) (en banc).

The concept of procedural due process has its roots in the United States Supreme Court's century old statement that "[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."[14] Prior to 1969,[15] when an ex parte provisional remedy — a remedy obtained by a creditor *prior* to judgment[16] — deprived the debtor of his property rights, the Supreme Court interpreted the due process clause to require that he be given an opportunity for a hearing at *some* stage of the garnishment proceedings.[17] However, the Court began to expand the scope of a debtor's due process rights with respect to these provisional remedies[18] in *Sniadach v. Family Finance Corp.*[19]

12. The case was heard on Nov. 15, 1979 before Chief Judge Seitz, Circuit Judge Aldisert, and District Judge Teitelbaum. The case was reargued on Apr. 28, 1980 before Chief Judge Seitz and Circuit Judges Aldisert, Adams, Gibbons, Rosenn, Weis, Garth, Higginbotham, and Sloviter. Chief Judge Seitz delivered the opinion of the court. Judges Aldisert and Weis filed dissenting opinions.

13. The court also vacated the district court's order denying class certification. 634 F.2d at 64.

14. Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1864). Relying upon *Baldwin,* the Court has more recently stated that "[I]t is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" Fuentes v. Shevin, 407 U.S. 67, 80 (1972), *quoting* Armstrong v. Manzo, 380 U.S. 545, 552 (1965). For a discussion of *Fuentes, see* notes 23-24 and accompanying text *infra.*

15. In 1969, the Supreme Court handed down its landmark decision in Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). For a discussion of *Sniadach, see* notes 20-22 and accompanying text *infra.*

16. In the context of debtor-creditor relationships, a provisional remedy is one "allowing a creditor to take possession of a debtor's property pending final resolution of the dispute." Alderman, *Default Judgments and Postjudgment Remedies Meet the Constitution: Effectuating* Sniadach *and its Pogeny,* 65 GEO. L.J. 1, 1 (footnote omitted). These provisional remedies are typically of an ex parte nature and are referred to as prejudgment remedies since they are utilized prior to the judicial determination of the debt. *See* Sniadach v. Family Fin. Corp., 395 U.S. 337, 340 (1969).

17. Alderman, *supra* note 16, at 6 & n.25. *See* Ewing v. Mytinger & Casselberry, 339 U.S. 594, 599 (1949).

18. For a definition of the term provisional remedy, *see* note 16 *supra.*

19. 395 U.S. 337 (1969). Subsequent due process cases in the prejudgment garnishment area include: North Ga. Finishing Co. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); and Fuentes v. Shevin, 407 U.S. 67 (1972). For a discussion of these cases, *see* notes 20-34 and accompanying text *infra.* For a further analysis of these cases, *see* Alderman, *supra* note 16, at 6-12; Dunham, *Post-Judgment Seizures: Does Due Process Require Notice and Hearing?,* 21 S.D. L. REV. 78, 88-92 (1976); Greenfield, *A Constitutional Limitation on the Enforcement of Judgments — Due Process and Exemptions,* 1975 WASH. U. L.Q. 877, 884-86.

The *Sniadach* Court held that, due to the statute's lack of notice and opportunity for a hearing prior to the garnishment of the debtor's wages, Wisconsin's prejudgment garnishment procedure was violative of the due process clause.[20] The Court found that, although the wage freeze was only temporary,[21] it "may as a practical matter drive a wage-earning family to the wall."[22] Three years after *Sniadach,* in *Fuentes v. Shevin,*[23] the Court extended the holding of *Sniadach* to include the replevin of property other than wages, by holding that the Constitution requires that prejudgment replevin statutes provide for preseizure notice and hearing even where the creditor claimed an interest in the property sought to be attached.[24]

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20. 395 U.S. at 342. Under the Wisconsin statute, a court clerk had issued a summons at the request of the creditor. *Id.* at 338. The clerk served notice on the garnishee who was then authorized to withhold one-half of the wages due the debtor. *Id.* at 338 n.1. Although the debtor was served with notice of the garnishment on the same day as the garnishee, the statute allowed 10 days for such service to be effectuated. *Id.* at 338. If the debtor had prevailed on the merits in the suit on the debt, his wages could have been unfrozen but during the interim the debtor was deprived of his earned wages. *Id.* at 338-39.

21. *Id.* at 339. For a discussion of the Wisconsin garnishment process, *see* note 20 *supra.*

22. 395 U.S. at 341-42 (footnote omitted).

23. 407 U.S. 67 (1972). In *Fuentes,* the debtors were purchasers of household goods under conditional sales contracts; the creditor retained title to the goods while the debtor was entitled to possession pending full payment. *Id.* at 70. The challenged Florida and Pennsylvania statutes authorized the prejudgment summary seizure of goods and chattels upon an ex parte application without a provision for preseizure notice and an opportunity for a preseizure hearing. *Id.* at 69-78. The laws in question allowed for the issuance of a writ of replevin upon the bare assertion of the party seeking the writ that he was entitled to the goods. *Id.* at 73, 76. Under Florida's procedures, the applicant was required only to file a complaint to initiate an action for repossession, claim entitlement to the goods in a conclusory manner, and post a security bond to cover the defendant's expenses should the debtor prevail in the action. *Id.* at 73. Under the Pennsylvania statute, a party could obtain a prejudgment writ of replevin in a manner similar to that used in Florida. *Id.* at 76. While the Florida statute provided for the eventual postseizure opportunity for a hearing at the trial for repossession, the Pennsylvania law did not require the creditor to initiate an action for repossession. *Id.* at 75, 77. Consequently the Pennsylvania law did not require that there ever be an opportunity for a hearing on the merits of the conflicting possession claims. *Id.* at 77.

24. *Id.* at 80-93. The statutes declared unconstitutional in *Fuentes,* unlike the statute in *Sniadach,* permitted the prejudgment replevin of property *other* than wages. *Id.* at 73-78. The *Fuentes* Court relied on *Sniadach* in its statement that "it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in terms of the Fourteenth Amendment." *Id.* at 84-85 (citations omitted). Emphasizing its position, the Court stated:

> The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significiant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.

Id. at 86.

However, only two more years passed before the Supreme Court, in *Mitchell v. W.T. Grant Co.*,[25] limited the holding of *Fuentes* by upholding Louisiana's ex parte sequestration procedure.[26] The *Mitchell* Court found these procedures to be constitutionally permissible despite the fact that they postponed notice and an opportunity to be heard until *after* the deprivation.[27] In so finding, the Court adopted a balancing of interests approach which weighed the competing interests of the debtor in reducing the risk of a wrongful deprivation of his property and the creditor who had retained a vendor's lien to secure the unpaid balance of the purchase price.[28] In applying this test, the *Mitchell* Court held that due process may be satisfied without a *prior* hearing so long as "adequate procedural safeguards" to protect the debtor are present.[29]

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25. 416 U.S. 600 (1974). The basic facts of *Mitchell* are identical to *Fuentes*. For a discussion of *Fuentes, see* notes 23-24 and accompanying text *supra*. As in *Fuentes*, the debtors in *Mitchell* were purchasers of household goods under a conditional sales contract in which the creditor retained a vendor's lien on the goods. 416 U.S. at 601-02. Under the Louisiana sequestration provisions, Grant filed suit against Mitchell for the undue and unpaid balance of the purchase price paid for the items. *Id.* at 601. The complaint further alleged that a writ of sequestration should issue to seize the merchandise pending the outcome of the suit and asserted that Grant had reason to believe that Mitchell would "encumber, alienate or otherwise dispose of the merchandise . . . during the pendency of [the] proceedings." *Id.* at 602. Based on this sworn petition and affidavit, and without notice or hearing to Mitchell, a judge ordered the constable of the court to seize and take into his possession the merchandise described in the petition. *Id.* This order was made after Grant, pursuant to the Louisiana statute, posted a bond to protect the alleged debtor against damage or expense. *Id.* at 602, 608.

26. 416 U.S. at 619-20. The sequestration procedure in *Mitchell* was essentially the same as replevin; it was utilized to attach personal property in the hands of the debtor by a creditor who had retained a vendor's lien in the goods. *Id.* at 601-05. For a discussion of the sequestration procedures litigated in *Mitchell, see* note 25 *supra*. For a discussion of the replevin procedures considered in *Fuentes, see* note 23 *supra*. In upholding the sequestration procedure, the *Mitchell* Court revitalized the traditional pre-*Sniadach* due process concepts. 416 U.S. at 609. The pre-*Sniadach* cases had held that due process required only that there be an opportunity for a hearing at some stage of the garnishment proceedings. *See* note 17 and accompanying text *supra*. While *Sniadach* and *Fuentes* required *pre*seizure notice and an opportunity for a hearing, *Mitchell* upheld a statute which provided only for *post*seizure procedural due process rights in the prejudgment context. *Compare* notes 19-24 and accompanying text *supra (Sniadach* and *Fuentes) with* note 25 and accompanying text *supra;* notes 27-29 and accompanying text *infra (Mitchell).*

27. 416 U.S. at 602-03.

28. *Id.* at 604-09. Since both the debtor and creditor had an interest in the property, the Court found it necessary to balance the risk to the debtor of a wrongful deprivation of his property, with the risk to the creditor of continued use, destruction, or concealment of the goods by the debtor, or that the goods may be transferred by the debtor prior to execution. *Id.*

29. *Id.* at 608-10. The Court found that the creditor's security interest in the property, the judicial supervision of the seizure of property, the requirement that the creditor allege specific facts rather than conclusory statements entitling

In *North Georgia Finishing Co. v. Di-Chem, Inc.*,[30] the Supreme Court seemed to revert to the rule of *Fuentes*[31] by holding that, even within a commercial setting,[32] the adequate procedural safeguards required by the due process clause mandated *pre*seizure notice and hearing in order to prevent the wrongful deprivation of property.[33] Relying

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him to the property, and the provision for a prompt postseizure hearing for the dissolution of the writ were significant to its finding that there were adequate postseizure procedural safeguards to hedge against the wrongful deprivation of the debtor's property even though preseizure procedural safeguards were not available to the debtor. *Id.* at 607-10, 614-17. Justice White's majority opinion distinguished *Sniadach* and *Fuentes* on the ground that postseizure procedures such as those found in *Mitchell* were not present. *Id.* at 614-16. However, Justices Powell, Stewart, Douglas, and Marshall viewed *Mitchell* as overruling *Fuentes*. *Id.* at 623 (Powell, J., concurring); *id.* at 634 (Stewart, J., dissenting). *See also id.* at 636 (Brennan, J., dissenting); North Ga. Finishing Co. v. Di-Chem, Inc., 419 U.S. 601, 609 (1975) (Powell, J., concurring); *id.* at 615-16 (Blackmun, J., dissenting). *But see* North Ga. Finishing Co. v. Di-Chem, Inc., 419 U.S. at 608 (Stewart, J., concurring). Justice Stewart observed: "It is gratifying to note that my report of the demise of *Fuentes v. Shevin* . . . seems to have been greatly exaggerated." *Id.*

30. 419 U.S. 601 (1975). In *Di-Chem*, the corporate debtor's bank account was seized after the creditor, Di-Chem, filed suit alleging an indebtedness for goods sold and delivered. *Id.* at 604. Pursuant to the Georgia garnishment statute, the bank account was seized without prior notice and an opportunity to be heard. *Id.* Under the Georgia statute, a writ of garnishment was issuable by a court clerk on an affidavit containing only conclusory allegations, without judicial supervision. *Id.* The law provided for the dissolution of the garnishment only when the debtor posted a security bond to cover any judgment against him. *Id.* For a discussion of the Court's analysis of these procedures, *see* notes 33-34 and accompanying text *infra*.

31. *Compare* Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) *and* Fuentes v. Shevin, 407 U.S. 67 (1972) *with* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). *See* notes 19-29 and accompanying text *supra*.

32. 419 U.S. at 608. Commentators had believed that *Di-Chem* would be distinguished from *Sniadach* because *Di-Chem*'s commercial setting involved parties of equal bargaining power. Alderman, *supra* note 16, at 11 & nn.62-63. *Di-Chem* involved the garnishment of a corporation's bank account rather than a consumer's household necessities. *See* 419 U.S. at 601. However, the Court dispelled this notion in *Di-Chem*. *Id.* at 608.

33. 419 U.S. at 607. According to the Court, the garnishment statute had none of the saving characteristics of the statute upheld in *Mitchell* which allowed postseizure notice and a postseizure hearing. *Id.* The Court enumerated six deficiencies of the Georgia procedures in *Di-Chem:*

> [1] The writ of garnishment [was] issuable on the affidavit of the creditor or his attorney, and the latter need not have had personal knowledge of the facts. . . . [2] The affidavit . . . need contain only conclusory allegations. [3] The writ is issuable . . . by the court clerk, without participation by a judge. [4] Upon service of the writ, the debtor is deprived of the use of the property in the hands of the garnishee . . . [5] There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment. [6] Indeed, it would appear that without the filing of a bond the defendant debtor's challenge to the garnishment will not be entertained, whatever the grounds may be.

Id. (citation omitted) (footnote omitted).

on the *Mitchell* rationale, the Court found that Georgia's *post*seizure process did not provide "adequate procedural safeguards" and therefore found them to be violative of the due process clause.[34]

The process due a judgment debtor in a *postjudgment* context differs from the procedures accorded to a *prejudgment* debtor.[35] While the Supreme Court recognized the applicability of the due process clause to postjudgment procedures in *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*,[36] the Court held that there was no constitutional mandate for notice and a hearing *prior* to postjudgment seizure.[37] The *Endicott* Court reasoned that since the judgment debtor had already been granted an opportunity to be heard, he should be on constructive " 'notice of what will follow,' no further notice being 'necessary to advance justice.' "[38]

However, the case of *Griffin v. Griffin* [39] casts doubt on the *Endicott* principle.[40] In *Griffin,* the Court held that a New York statute which provided for an ex parte motion seeking a judgment for accrued alimony installments without prior notice and an opportunity to be heard

34. *Id.* at 606-07. *See* Dunham, *supra* note 19, at 91-92; note 33 and accompanying text *supra.* While *Sniadach* and *Fuentes* required notice and a hearing *before* a prejudgment seizure, the Court in *Di-Chem* focused mainly on the inadequate safeguards against mistaken repossession. *See* 419 U.S. at 606; Dunham, *supra,* at 92. The cumulative reading of *Sniadach* and its progeny suggests a requirement of either preseizure notice and hearing or an ex parte procedure similar to that involved in *Mitchell* in which "adequate" procedural safeguards are provided. Alderman, *supra* note 16, at 12 & n.66.

35. *See* Endicott-Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924); notes 36-38 and accompanying text *infra.*

36. 266 U.S. 285 (1924).

37. *Id.* at 288-90. The Court upheld a New York statute which permitted the garnishment of 10% of a judgment debtor's wages, despite the absence of notice and a hearing prior to the garnishment. *Id.*

38. *Id.* at 288 (citations omitted). In its full text, the Court stated:

> [T]he established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment. Thus, in the absence of a statutory requirement, it is not essential that he be given notice before the issuance of an execution against his tangible property; after the rendition of the judgment he must take "notice of what will follow," no further notice being "necessary to advance justice."

Id. (citations omitted). *See also* Dunham, *supra* note 19, at 79.

39. 327 U.S. 220 (1946).

40. *See* Dunham, *supra* note 19, at 80-88; Greenfield, *supra* note 19, at 893. For a discussion of the *Finberg* majority's disposition of the *Endicott* principle, *see* text accompanying notes 68-69 & 100-08 *infra.*

violated the due process clause.[41] The *Griffin* Court ruled that the entry of judgment would cut off the husband's right to a retroactive modification of the decree,[42] stating that

> [w]hile it is undoubtedly true that the [original] decree . . . gave [the husband] notice . . . that further proceedings might be taken, . . . we find this no ground for saying that due process does not require further notice of the time and place of such further proceedings, inasmuch as they undertook substantially to affect his rights in ways in which the [original] decree did not.[43]

Since *Griffin,* the Supreme Court has twice declined to consider whether *Endicott* should be overruled,[44] thereby retaining the apparent

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41. 327 U.S. at 220. Under New York law, an alimony decree could not be enforced until a judgment for the amount of the accrued but unpaid alimony had been docketed as a judgment. *Id.* at 227.

42. *Id.* The husband could have defended against docketing the judgment on the ground that the alimony decree should have been modified because of the death or remarriage of the wife, discharge of the obligation by payment, or changed circumstances justifying a reduction of alimony already accrued. *Id.*

43. *Id.* at 229 (footnote omitted). However, the Court did not discuss or cite *Endicott.* For a discussion of *Endicott, see* notes 36-38 and accompanying text *supra.*

44. Moya v. DeBaca, 286 F. Supp. 606 (D.N.M. 1968) (three-judge court), *appeal dismissed,* 395 U.S. 825 (1969) (per curiam); Knight v. DeMarcus, 102 Ariz. 105, 425 P.2d 837, *cert. granted sub nom.* Hanner v. DeMarcus, 389 U.S. 926 (1976), *cert. dismissed,* 390 U.S. 736 (1968) (per curiam).

In *Hanner,* four justices dissented from the dismissal of certiorari, stating that the Court should have decided whether or not *Endicott* should be overruled; three of them argued that *Endicott* should be formally overruled in light of several subsequent Supreme Court decisions. 390 U.S. at 736 (Douglas, J., dissenting from dismissal of certiorari). *See also id.* at 742 (Brennan, J., dissenting from dismissal of certiorari). Justice Douglas noted that the *Endicott* principle had never been reaffirmed by the Court. *Id.* at 740 (Douglas, J., dissenting from dismissal of certiorari). Justice Douglas also suggested that *Griffin* rejected the constructive notice rationale of *Endicott. Id.* at 741 (Douglas, J., dissenting from dismissal of certiorari). In addition, he believed that *Griffin* pointed the way towards the demands of due process, required in *Hanner,* where the plaintiff's property was executed against subsequent to a judgment or a debt without adequate notice. Justice Douglas felt that the execution and the judicial sale "substantially effected" the property owner's rights in ways in which the original judgment on the debt did not. *Id.* at 742 (Douglas, J., dissenting from dismissal of certiorari), *quoting* Griffin v. Griffin, 327 U.S. at 229. Justice Douglas noted that substantial property rights were at stake at further proceedings in *Griffin* "because state law entitled the debtor to reduce his debt on proof of changed circumstances; in the instant case substantial property rights were at stake because state law gave the debtor the right to select property to be levied on . . . [thereby] prevent[ing the creditor] from seizing property worth $20,000 or $40,000. . . ." to satisfy a judgment slightly more than $5,000. *Id.* The dissent also noted the recent expansion of the scope of the notice requirement as well as the Court's new approach to the adequacy of notice. 390 U.S. at 741 (Douglas, J., dissenting from dismissal of certiorari), *citing* Armstrong v. Manzo, 385 U.S. 545 (1965) (notice of pending adoption proceedings must be given to natural father); Lambert v. California,

inconsistency between the two cases.[45] A number of federal and state courts have attempted to address the issue of the scope of due process requirements in the area of postjudgment execution procedures.[46] Most of the decisions like *Endicott,* have denied the right to *pre*seizure notice and hearing for judgment debtors,[47] although some courts have

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355 U.S. 255 (1957) (notice required where law placed a duty on a felon to register; due process limits the general rule that ignorance of the law will not excuse); Covey v. Town of Somers, 351 U.S. 141 (1956) (notice of a property tax foreclosure in which notice was given by mail, a posting at the post office, and publication in local newspapers was inadequate where the taxpayer was known to be incompetent and without the protection of a guardian); Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306 (1950) (notice given by trustee pursuant to a judicial settlement of its accounts through newspaper publications was inadequate with respect to known present beneficiaries of a known place of residence; "The means employed must be such as one desirous of actually informing the [opposing party] might reasonably adopt to accomplish it").

Justice Douglas went on to reiterate the Supreme Court's view that:

> [e]ngrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has a chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.

390 U.S. at 741 n.3 (Douglas, J., dissenting from dismissal of certiorari), *quoting* Lambert v. California, 355 U.S. at 228.

In *Moya,* the Court dismissed an appeal from a decision which had relied on *Endicott;* the judgment sustained the constitutionality of a postjudgment garnishment statute which required neither notice nor an opportunity for the judgment debtor to be heard. 395 U.S. at 825. It is interesting to note that the dismissal of *Moya* came only a few days after the *prejudgment* garnishment decision in *Sniadach. See Sniadach,* 395 U.S. at 337 (Jun. 9, 1969); Moya v. DeBaca, 395 U.S. at 825 (Jun. 23, 1969). While Justices Harlan and Brennan would have remanded the case in light of *Sniadach,* Chief Justice Warren and Justice Douglas, who had dissented from the dismissal of certiorari in *Hanner,* did not join in the dissent. *See* 395 U.S. at 825 (Harlan, J., dissenting). For a discussion of the effects of *Hanner* and *Moya* on the inconsistency between *Endicott* and *Griffin, see* Kennedy, *Due Process Limitations on Creditor's Remedies: Some Reflections on* Sniadach v. Family Finance Corp., 19 AM. U.L. REV. 158, 173-76 (1969-70); notes 103-04 and accompanying text *infra.*

45. *See* note 40 and accompanying text *supra.* One possible distinction between *Endicott* and *Griffith* could be that in *Endicott* the judgment debtor should expect prompt execution once his indebtedness has been adjudicated. In *Griffith,* the ex-wife was not entitled to seek the enforcement of an alimony decree until a judgment had been docketed. *See* note 41 *supra.* Since many years may intervene before the ex-husband fails to keep up with his payments, the possibility of changed circumstances should be able to be asserted before judgment is entered against him. For a discussion of other possible distinctions between *Endicott* and *Griffith, see* Dunham, *supra* note 19, at 80-88.

46. *See* notes 47-66 and accompanying text *infra.*

47. *See* Brown v. Liberty Loan Corp., 539 F.2d 1355 (5th Cir. 1976), *cert. denied,* 430 U.S. 949 (1977) (Florida's postjudgment garnishment procedures were not unconstitutional since they provided for a hearing within two weeks after the judgment debtor claimed his exemption); First Nat'l Bank v. Hasty, 410 F. Supp. 482 (E. D. Mich. 1976) (due process does not require a preseizure hearing, the propriety of the garnishment may properly be postponed until after

ruled to the contrary.[48] Notably, in three cases which have dealt with statutory exemptions similar to those in *Finberg*, each has found that, at a minimum, due process requires adequate *post*seizure protections.[49]

attachment on the authority of *Mitchell);* Halperin v. Austin, 385 F. Supp. 1009 (N.D. Ga. 1974) (three-judge court) (court relied on *Endicott* and held that a "divorce decree and alimony judgment as a basis for the garnishment establishes 'the *validity*, or at least the *probable validity*, of the underlying claim against' plaintiff before he was deprived of his property"; *"Sniadach* and its progeny should be limited to *pre*judgment procedures"); Katz v. Ke Kam Kim, 379 F. Supp. 65 (D. Haw. 1974) (postjudgment wage garnishment constitutional on the authority of *Endicott);* Langford v. Tennessee, 356 F. Supp. 1163 (W.D. Tenn. 1973) (per curiam) (three-judge court) (sustained statute which did not provide for a preseizure hearing to determine whether the property to be levied was exempt from attachment); Moya v. De Baca, 286 F. Supp. 606 (D.N.M. 1968) (three-judge court), *appeal dismissed,* 395 U.S. 825 (1969) (per curiam) (court relied on *Endicott* and held that garnishment procedures do not violate due process despite lack of notice and hearing); Knight v. DeMarcus, 102 Ariz. 105, 425 P.2d 837, *cert. granted sub nom.* Hanner v. DeMarcus, 389 U.S. 926 (1967), *cert. dismissed,* 390 U.S. 736 (1968) (per curiam) (relying on *Endicott);* Phillips v. Bartolomie, 46 Cal. App. 3d 346, 121 Cal. Rptr. 56 (1975) (due process does not require a hearing prior to levy on a bank account consisting solely of exempt funds); Raigoza v. Sperl, 34 Cal. App. 3d 560, 110 Cal. Rptr. 296 (1973) (upheld postjudgment garnishment of wages which may be exempt from execution despite lack of notice and hearing); Wilson v. Grimes, 232 Ga. 388, 207 S.E.2d 5 (1974) (lack of notice and hearing prior to garnishment under an alimony decree held constitutional); Bittner v. Butts, 514 S.W.2d 556 (Mo. 1974) (no preseizure procedures required under foreign judgment statute); Hehr v. Tucker, 256 Or. 254, 472 P.2d 797 (1970) (preseizure procedures not required under foreign judgment statute).

48. Strick Corp. v. Thai Teak Prods. Co., 493 F. Supp. 1210 (E.D. Pa. 1980) (court distinguished district court opinion in *Finberg* and held that Pennsylvania's garnishment procedure was unconstitutional on the basis of *Endicott;* the statute garnished the property of "alter egos" of debtors — parties other than the judgment debtors who had not had their day in court unlike the debtor in *Endicott);* Betts v. Tom, 431 F. Supp. 1369 (D. Haw. 1977) (due process requires either notice and hearing to judgment debtors before funds traceable to exempt Aid to Families with Dependent Children grants are garnished or, at a minimum, adequate procedural safeguards and a prompt postseizure hearing similar to those found permissable in *Mitchell);* Vail v. Quinlan, 387 F. Supp. 630, 635 n.3 (S.D.N.Y. 1975), *rev'd on other grounds sub nom.* Juidice v. Vail, 430 U.S. 327 (1977) (use of civil contempt to enforce compliance with an information subpoena was unconstisutional for failure to provide notice and a proper hearing to judgment debtor; *Endicott* deemed not controlling because the deprivation in *Vail* was a liberty not a property interest); City Fin. Co. v. Wilson, 238 Ga. 10, 231 S.E.2d 45 (1976) (postjudgment garnishment law held unconstitutional for failure to provide minimum procedural safeguards similar to those in *Mitchell);* Salahub v. Montgomery Ward & Co., 41 Or. App. 775, 599 P.2d 1210 (1979) (postjudgment execution statute held unconstitutional for failure to provide notice of the garnishment of a bank account consisting solely of exempted funds since prejudgment writ of attachment did provide such notice); Luskey v. Steffron, Inc., 461 Pa. 305, 336 A.2d 298 (1975), *aff'd on rehearing,* 469 Pa. 377, 366 A.2d 223 (1976), *cert. denied,* 430 U.S. 968 (1977) (court held unconstitutional Pennsylvania's procedures for the sale of real property in satisfaction of judgments; the law which permitted notice by publication in local newspapers and by the posting of handbills on the property failed to provide adequate notice; court noted that its decision was contrary to the rationale employed in *Endicott).*

49. Brown v. Liberty Loan Corp., 539 F.2d 1355, 1368-69 (5th Cir. 1976), *cert. denied,* 430 U.S. 949 (1977); Betts v. Tom, 431 F. Supp. 1369, 1377-78 (D.

In *Brown v. Liberty Loan Corp.*,[50] a judgment debtor challenged Florida's postjudgment wage garnishment procedure which failed to provide for notice and an opportunity to be heard to establish the validity of an exemption claim prior to the garnishment of wages.[51] In distinguishing the case from *Sniadach* on the basis of the pre/post-judgment issue, the court found that the judgment creditor's interest was paramount, and therefore denied preseizure notice and a hearing.[52] The court concluded, however, that the Florida procedures satisfied due process requirements because they provided the judgment debtor with adequate notice[53] and a prompt *post*seizure hearing.[54]

In *Raigoza v. Sperl*,[55] a California court sustained the constitutionality of that state's postjudgment wage garnishment procedures even though the statutes allowed the attachment of exempt wages before a hearing was held.[56] Unlike the court in *Brown*, the *Raigoza* court rejected the debtor's contention that the rationale of *Sniadach* and *Fuentes* — the Supreme Court's prejudgment cases — should apply.[57] Furthermore, the court rejected the debtor's attempts to characterize the proceedings in which the validity of exemptions were determined as an entirely new proceeding involving significantly different legal

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Haw. 1977); Raigoza v. Sperl, 34 Cal. App. 3d 560, 562-64, 110 Cal. Rptr. 296, 298-299 (1973). For a brief discussion of the holdings of these cases, *see* notes 47-48 and accompanying text *supra*.

50. 539 F.2d 1355 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977).

51. 539 F.2d at 1357-58. In *Brown* the debtor was deprived of her wages for 17 days before the attachment was dissolved based on her head of the household exemption. *Id.* at 1358.

52. *Id.* at 1363, 1365-68. The *Brown* court rejected the contention that the precedential value of *Endicott* is negligible in view of *Griffin* and the procedural due process analysis of *Sniadach* and its progeny. *Id.* at 1364-68. However, based upon those cases the Court recognized the need to balance the various interest involved in order to determine the scope of due process requirements in the area of debtor-creditor relationships. *Id.* For a discussion of *Sniadach* and its progeny, *see* notes 19-34 and accompanying text *supra*.

53. 539 F.2d at 1368. The court found that, although there was no actual notice, the debtor is altered to further legal actions based on the notice provided in the proceedings leading to the underlying judgment. *Id.* The court conceded however that the meaningfulness of the notice is dependent on the debtor's awareness of the need to apply for the exemption. *Id.*

54. *Id.* The statute required that the creditor file an affidavit denying the exemption within two days of the debtor's claim of the exemption. *Id.* Furthermore, the hearing was held about two weeks after the writ of garnishment was served on the garnishee. *Id.*

55. 34 Cal. App. 3d 560, 110 Cal. Rptr. 296 (1973).

56. *Id.* at 567, 110 Cal. Rptr. at 301.

57. *Id.* at 567 & n.9, 110 Cal. Rptr. at 301 & n.9. For a discussion of *Brown*, *see* notes 50-54 and accompanying text *supra*.

issues.[58] Thus, the court found that the garnishment procedures'[59] failure to provide a *pre*seizure hearing to determine the validity of exemption claims in the postjudgment context was consistent with the due process clause; therefore, the *post*seizure procedures were upheld.[60]

Betts v. Tom[61] is a case closely analogous to *Finberg* in that it involved the postseizure garnishment of a judgment debtor's bank account consisting of welfare assistance grants which were exempt from execution under Hawaii law.[62] Applying the balancing test of the Supreme Court's procedural due process cases, the district court found the *debtor's* interest paramount.[63] In finding Hawaii's procedures un-

58. 34 Cal. App. 3d at 567, 110 Cal. Rptr. at 301. The debtor had argued "that the only issue determined in the proceedings that resulted in the judgment against the debtor was the fact that the debtor owed the creditor a specific amount of money, but that those proceedings did not decide what the creditor was entitled to seize to satisfy that judgment." *Id.* In rejecting this claim the court stated: "however laudable the policy of legislative exemptions, the policy is not constitutionally required." *Id.*

59. For an extended discussion of the garnishment procedures under attack in *Raigoza, see* notes 120 & 125 *infra.*

60. 34 Cal. App. 3d at 568, 110 Cal. Rptr. at 301. The *Raigoza* decision was subsequently relied on to deny notice and a hearing where a bank account consisting solely of exempt federal disability pensions (V.A. and social security) and AFDC foster care grants were garnished. Phillips v. Bartolomie, 46 Cal. App. 3d 346, 121 Cal. Rptr. 56 (1975). For a brief discussion of the holdings of *Raigoza* and *Phillips, see* note 47 *supra.*

61. 431 F. Supp. 1369 (D. Haw. 1977).

62. *See* 431 F. Supp. at 1369. In *Betts,* the judgment creditor garnished a judgment debtor's bank account consisting of Aid to Families with Dependent Children (AFDC) assistance grants which were exempt from execution under Hawaii law. *Id.* at 1370-71. The debtor was denied use of the funds for four weeks before she was able to have the writ of garnishment quashed. *Id.* at 1372. As a result of the inability to use her AFDC grant, Betts experienced great difficulty in supplying her family with the basic necessities of life. *Id.* The debtor subsequently challenged the constitutionality of Hawaii's postjudgment garnishment procedures. *Id.*

63. *Id.* at 1375-77. Although the court found that *Griffin* did not completely overrule *Endicott,* it concluded on the basis of *Sniadach* and its progeny that, "[t]oday a court should not blindly follow the *Endicott-Johnson* decision. . . . [A] new analysis of due process requirements in light of the interests involved [is justified]." *Id.* at 1374. In balancing the interests of the creditor, debtor, and the state, the court found the debtor's interests to prevail. *Id.* at 1375-76. In doing so, the *Betts* court concluded that the AFDC grant implies a recognition by the state that without the use of such funds the recipient would be unable to supply even the basic needs of his or her children. *Id.* at 1375. Therefore, the recipient was found to have a clear and compelling interest in a preseizure hearing to prevent an erroneous deprivation of these funds. *Id.* at 1375-76. The court concluded that a "[d]eprivation for even a few days can often be disastrous" as it would leave a family in immediate danger of falling below the subsistence level. *Id.* at 1376. Thus, the debtor's interest was found to have outweighed that of the creditor in immediately satisfying his judgment. *Id.* Finally, the court found the state's interest to be neutral — "The public interest will be satisfied by any smooth-functioning and well run system of execution" which employed procedural safeguards to prevent erroneous seizures. *Id.* at 1376-77.

constitutional,[64] the court concluded that *pre*seizure notice and hearing were permissible but not required.[65] The *Betts* Court found that, at a minimum, adequate procedural safeguards and a prompt *post*seizure hearing were constitutionally mandated.[66]

Writing for the *Finberg* majority, Chief Judge Seitz began his analysis by focusing on the due process issue.[67] Having noted that the *Endicott* Court had denied the need for any postjudgment/preseizure notice or hearing on the basis of the constructive notice rationale,[68] the Third Circuit distinguished the present case from *Endicott* on the ground that *Finberg* involved the question of whether due process permitted a judgment debtor to be deprived of property which was statutorily exempt from garnishment.[69]

Next, the *Finberg* court examined the line of cases granting due process rights to prejudgment attachments of property.[70] Conceding that they were distinguishable from the case at bar, Chief Judge Seitz nonetheless found them to be controlling.[71] The court reasoned that the attachment of property held by a garnishee, like a prejudgment seizure, was a provisional remedy presenting similar competing inter-

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64. *Id.* at 1377-78. The court found that the Hawaii procedures created a substantial risk that an AFDC recipient would be erroneously deprived of his or her benefits. *Id.* at 1377. The court noted that the statute made no provision for preseizure notice and hearing and judicial review but did require that the creditor file a non-conclusory affidavit attesting to the non-exempt status of the property garnished. *Id.*

65. *Id.* at 1377-78.

66. *Id.* The *Betts* Court determined that a system of protections more limited than preseizure notice and hearing would also decrease the risk of an erroneous deprivation of the judgment debtor's property. *Id.* at 1377. Based on the sequestration statute approved in *Mitchell,* the *Betts* court required, at a minimum, a non-conclusory affidavit signed by a judgment creditor, review by a judicial officer, and a quick hearing on any claimed AFDC exemption. *Id.* at 1377-78. For a discussion of *Mitchell, see* notes 25-29 and accompanying text *supra.*

The court noted that its holding was to be read narrowly; the decision dealt only with the exemption for AFDC grants. 431 F. Supp. at 1378 n.21, 1379. A subsequent case *upheld* the same statute as applied to the garnishment of exempt wages. *See* Betts v. Coltes, 467 F. Supp. 544 (D. Haw. 1979).

67. 634 F.2d at 56. *See* notes 68-86 and accompanying text *infra.*

68. 634 F.2d at 56. For a discussion of *Endicott, see* notes 35-38 and accompanying text *supra.*

69. 634 F.2d at 56-57.

70. *Id.* at 57. The court briefly analyzed *Sniadach, Fuentes, Mitchell,* and *Di-Chem. Id.* For a discussion of these cases, *see* notes 19-34 and accompanying text *supra.*

71. 634 F.2d at 57. Chief Judge Seitz noted that the prejudgment cases differed from the present case in that the creditor had not yet reduced its claim of indebtedness to judgment prior to the seizure. *Id.*

ests between a debtor and a creditor.[72] According to the court, this basic similarity was not altered by the fact that in the present case the creditor had already obtained a judgment of indebtedness.[73] The court noted that Sterling's judgment represented only an adjudication of Finberg's debt and was not a transfer of title of Finberg's property to Sterling.[74] As Finberg could still defeat the garnishment with other defenses not adjudicated on the merits, such as exemption claims, the majority concluded that she still had a protectable interest in the property, thereby bringing the case within the ambit of the Supreme Court's prejudgment garnishment decisions.[75]

Following the mandate of the Supreme Court's prejudgment cases, the *Finberg* court then balanced the competing interests[76] of the creditor[77] and the debtor[78] before considering whether the Pennsylvania

72. *Id.* at 57-58. Chief Judge Seitz compared the garnishment of Finberg's bank accounts to a prejudgment seizure in that both were "provisional measure[s] serving the . . . creditor's interests by preventing transfer or concealment of property before the creditor can execute a final seizure. [Similarly,] [t]he attachment affects the debtor's interest by depriving her of the continued use of her property." *Id.*

73. *Id.* at 58.

74. *Id.* The court noted that only upon the completion of the garnishment process could Sterling obtain the right to seize Finberg's bank accounts. *Id.*

75. *Id.* The court stated that the judgment "debtor retains a protectable interest in the use of her property during the pendency of the creditor's action." *Id.* The court also noted that it was taking the same approach to postjudgment garnishment as did the courts in *Brown* and *Betts*. *Id.* For a discussion of *Brown, see* notes 50-54 and accompanying text *supra*. For a discussion of *Betts, see* notes 61-66 and accompanying text *supra*.

76. 634 F.2d at 58. The balancing test on which the *Finberg* court relied for the determination of what procedures are due was clearly enunciated by the Supreme Court in Matthews v. Eldridge, 424 U.S. 319 (1976):

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of these distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 319.

For a discussion of the interests of the parties, *see* notes 77 & 78 *infra*. For a discussion of Chief Judge Seitz's disposition of these competing interests, *see* 634 F.2d at 58-62; notes 80-86 and accompanying text *infra*.

77. 634 F.2d at 58. The court noted two strong interests of the creditor in the enforcement of the judgment. *Id.* at 85. First, the creditor, having already incurred expenses in establishing the debtor's liability, has a strong interest in the "prompt and inexpensive satisfaction of the debt"; additional delay and expense will diminish the value of his recovery. *Id.* Second, the ability to seize liquid assets in a bank account rather than a levy and judicial sale of nonmonetary assets is faster and less expensive, hence the ability to seize these assets advances the creditor's interests. *Id.* at 58.

78. *Id.* The court accorded the debtor's interests in the seizure of an individual bank account great weight. *Id.* Not only may such accounts contain

garnishment procedures represented "a fair accommodation of the respective interests of creditor and debtor." [79] Noting that the plaintiff did not contend that due process required a hearing *prior* to seizure,[80] the court concluded that the Pennsylvania procedures [81] were inadequate for their failure to provide for proper procedural protections *after* the attachment was made.[82] Specifically, Chief Judge Seitz found that the procedures were constitutionally infirm for their failure to provide for a prompt postseizure hearing [83] as well as adequate postseizure notice to the judgment debtor.[84] The court found that the rule which was applicable to garnishment actions against intangible property imposed no time limit on the hearing process by which exemption claims could be validated.[85] The notice requirement was found to be inadequate

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funds needed for the basic necessities of life, the court reasoned, but the funds may be covered by exemptions designed to protect the means used to purchase those basic necessities. *Id.*

79. *Id.* For the court's analysis of the procedures in Pennsylvania, *see* notes 80-86 and accompanying text *infra.*

80. 634 F.2d at 59. The court noted that Finberg's contentions focused on the inadequacy of *post*seizure procedures to protect property which is subject to exemptions. *Id.* at 59. Finberg's due process claim noted the absence of a prompt postseizure hearing, the lack of adequate postseizure notice, the fact that the creditor was not required to file an affidavit stating that the writ of execution would not cause the attachment of exempt property, the lack of a requirement for the posting of a bond by the creditor to protect the debtor in the event exempt property was attached, and the fact that the writ had not been issued by a judicial officer. *Id.*

81. PA. R. CIV. P. 206-209, 3121(d), 3123. For a discussion of these procedures, *see* notes 83-86 and accompanying text *infra.*

82. *See* notes 83-86 and accompanying text *infra.*

83. 634 F.2d at 59-61. For a more detailed discussion of the court's reasoning on the issue of the promptness of postseizure hearing, *see* note 85 *infra.*

84. 634 F.2d at 61-62. For a more detailed discussion of the court's reasoning on the issue of the adequacy of postseizure notice, *see* note 86 and accompanying text *infra.*

85. 634 F.2d at 60. Chief Judge Seitz first noted that the debtor's and creditor's interests are harmonious on this issue; the debtor has an interest in promptly asserting her exemptions while the creditor has an interest in delaying the proceedings only to the extent necessary to frame a response to the debtor's claims. *Id.* at 59.

It must be noted that subsequent to the *Finberg* decision, the Pennsylvania Supreme Court amended Rules 3108, 3123(d), 3142(a), 3252 and adopted Rule 3123.1. *See* PA. R. CIV. P. 3108, 3123 (d), 3123.1, 3142(a), 3252; Explanatory Note following Rule 3108; Note following 3123.1; Forms following Rule 3252 (a). For brief discussion of these revisions, *see* note 98 *infra.*

The court analyzed rule 3121(d) which allowed a court to "set aside the writ, service or levy . . . (2) Upon a showing of exemption or immunity of property from execution." *Id., quoting* PA. R. CIV. P. 3121(d), The court noted that the proceedings under this rule were governed by rules 206-209 and Philadelphia General Civic Rule 140 for Philadelphia County. *Id., citing* Misco Int'l Chem., Inc. v. Spritz, 5 Pa. D.&C.3d 779, 782-83 (Phila. Cty C.P. 1977); Hollinger v. Penn Harris Real Estate, Inc., 39 Pa. D.&C.2d 201, 105-06

in failing to provide Finberg with notice of the two exemptions available to her and the procedures for claiming those exemptions.[86]

(Dauphin Cty. C.P. 1966). The court found that the 15 day period which the creditor is alloted to file a response to a petition, was too long, even if an immediate hearing were granted. 634 F.2d at 59. The court found that the debtor's interest in the release of the funds which were needed for food, shelter, and other basic needs outweighs the creditor's interests; the creditor "has little need for this much time in preparing a response" to the relatively uncomplicated exemption issue. *Id.* Even after the 15 day response period, further delays are likely. *Id.* at 60. The creditor can delay the proceedings indefinitely by demanding proof on any of the debtor's allegations, and by taking depositions on disputed issues of fact. *Id.* The court concluded that the rules imposed no time on the deposition process, consequently the process is not by nature swift. *Id.*

Next, the court focused on rule 3123 which governed the procedures for claiming a statutory exemption by a judgment debtor. *Id.* A debtor who presents an exemption claim to the sheriff could have property equal to the value of the exemption set aside. PA. R. CIV. P. 3123. Subsection (d) of rule 3123 provided for a 48 hour period in which the judgment debtor could appeal from the sheriff's appraisal or designaton of property. *Id.* Contrary to the district court's findings, the Third Circuit found that the process under rule 3123 was not "prompt." 634 F.2d at 60. For the district court's conclusions, *see* 461 F. Supp. at 262. Furthermore, the rule indicated to the court that it applied to property held by a sheriff in preparation for a judicial sale. *Id.* In contrast, the court noted, "in a garnishment action against intangible property, the property stays in the hands of the garnishee until the court enters judgment against the garnishee." 634 F.2d at 60 (citations omitted). Chief Judge Seitz noted that Pennsylvania appellate court cases in this area support the proposition that rule 3123 had no application in the garnishment of a debt. 634 F.2d at 60 & n.6, *citing* Bancord v. Parker, 65 Pa. 336, 337-38 (1870). Under the rules from which rule 3123 was derived, the judgment debtor could claim his exemption for property held by a garnishee either by notifying the sheriff when the sheriff served the debtor with the writ of execution, or by asserting the claim during court proceedings on the garnishment. 634 F.2d at 60 & n.6, *citing* Bancord v. Parker, 65 Pa. at 338; Hild Floor Mach. Co. v. Rudolph, 156 Pa. Super. Ct. 102, 39 A.2d 457 (1944). The court noted that under the rules in effect as of the time of the *Finberg* decision the sheriff did not serve the debtor and the only opportunity for the debtor to assert a claim of exemption was in court under rule 3121(d). 634 F.2d at 60 n.6. For a discussion of Judge Aldisert's dissenting opinion on this issue, *see* note 97 and accompanying text *infra*.

86. 634 F.2d at 62. Chief Judge Seitz noted that the fundamental principles of due process required timely and adequate notice of the garnishment of Finberg's bank accounts. *Id.* at 61-62, *citing* Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306 (1950). Finberg's contentions were twofold: that the notice might not reach the debtor and that the notice did not apprise her of the possible exemptions that might apply to her property. 634 F.2d at 61. Since notice was received by Finberg from the garnishee in accordance with rules 3140(a) & (c), the court refused to decide the issue of lack of timely notice. *Id., citing* United States v. Rains, 362 U.S. 17 (1960).

As to Finberg's second claim, the court found that the notice was not "reasonably calculated, under all the circumstances, to . . . afford [interested parties] an opportunity to present their objections." *Id.* at 61-62, *citing* Mallane v. Central Hanover Bank & Tr. Co., 339 U.S. at 314. The court noted the decision in Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978), in which the Supreme Court held that the required content of notice depends upon the facts of each case. 634 F.2d at 62, *citing* 436 U.S. at 14 n.15. In *Memphis Light,* the Court found that the public utility's notices to customers that it was terminating their services was violative of due process for failure to inform the customers of the process for contending terminations. 436 U.S. at

Finally, the majority found that the Pennsylvania procedures were in conflict with the Social Security Act which exempts a recipient's benefits from being attached.[87] Based upon its disposition of the due process claims,[88] the *Finberg* court found that under the Pennsylvania law a judgment debtor was likely to be deprived of his or her exempt benefits for long periods of time.[89] Therefore, viewing the state statute "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," [90] the Third Circuit declared it invalid under the supremacy clause.[91]

Filing an "irreconcilable" dissent,[92] Judge Aldisert took issue with the majority's interpretation of the relevant Supreme Court cases; he

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13-15. Therefore, reasoned the Third Circuit, the failure to provide Finberg with notice of the two exemptions available to her and the procedures for claiming those exemptions was violative of due process. 634 F.2d at 62. The court noted that the lack of knowledge of the exemptions might prevent the debtor from consulting with an attorney before the attachment and thus present hardships for the debtor, especially where the attached funds are required for basic necessities. *Id.* Furthermore, the court found that notice could be provided as part of the writ of execution, served on the debtor by the garnishee under rule 3140(a), without imposing undue burdens on either the state or the creditor. *Id.* at 62. For a discussion of the dissent's position on the issue of the adequacy of notice, *see* note 95 and accompanying text *infra.*

Finally, the court concluded that while a preliminary affidavit, bond, and judicial issuance may be desirable, they are not constitutionally required. 634 F.2d at 62, *citing* Brown v. Liberty Loan Corp., 539 F.2d at 1369. For a discussion of *Brown, see* notes 50-54 and accompanying text *supra.*

87. 634 F.2d at 63, *citing* 42 U.S.C. § 407 (1976). For the relevant text of § 407, *see* note 6 *supra.*

88. *See* 634 F.2d at 56-62; notes 67-86 and accompanying text *supra.*

89. 634 F.2d at 63.

90. 634 F.2d at 63, *quoting* Hines v. Davidowitz, 312 U.S. 52, 67 (1941). "The test requires an examination of the purposes of the federal law as well as the effect of the operation of the state law on these purposes." 634 F.2d at 63, *citing* Perez v. Campbell, 402 U.S. 637 (1971). The court first noted that "[t]he overall objective of the social security system is 'the protection of its beneficiaries from some of the hardships of existence.'" 634 F.2d at 63, *quoting* United States v. Silk, 331 U.S. 704, 711 (1947). The court found that the exemption of these benefits from legal process furthered this objective by ensuring uninterrupted use of the benefit funds. 634 F.2d at 63. The court stated that the effect of the Pennsylvania procedures defeated this purpose by allowing bank accounts to be attached and frozen without regard to whether they contain social security funds. *Id.*

91. 634 F.2d at 62-63. For the text of the supremacy clause, *see* note 10 *supra.*

92. 634 F.2d at 64 (Aldisert, J., dissenting). Judge Aldisert stated: "My disagreement with the majority is fundamental and all persausive. . . . My views . . . are nadiral to those of the majority; our disagreement, irreconcilable." *Id.* Before reaching the constitutional issues, Judge Aldisert stated that the litigants before the court lacked true adversariness and that Finberg's claim was moot as the plaintiff had already received the remaining $23.50 of the attached

found that the *creditor's* interest was paramount in the postjudgment context.[93] Moreover, Judge Aldisert found that the Pennsylvania garnishment procedures *did* provide a judgment debtor with "prompt" [94]

funds pursuant to the district court's order. *Id.* at 64-69 (Aldisert, J., dissenting). *See* 461 F. Supp. at 263. For a discussion of the source of this remaining $23.50, *see* note 7 *supra*. However, Judge Aldisert found error in the lower court's denial of class certification. 634 F.2d at 69 (Aldisert, J., dissenting), *citing* United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980). Therefore, the judge addressed the due process and supremacy clause questions. 634 F.2d at 69 (Aldisert, J., dissenting).

In his dissent, Judge Aldisert noted his "grave reservations . . . about the implications of [the majority's] action for the federal system." *Id.* The dissent noted three considerations which require greater caution than the majority exercised in its opinion. *Id.* The majority, contended Judge Aldisert, failed to follow the Supreme Court's mandate

> that federal courts should presume "that the statute will be construed in such a way as to avoid the constitutional question presented," . . . and that "state courts may be reluctant to attribute to their legislature an intention to pass a statute raising constitutional problems, unless such legislative intent is particularly clear."

Id. (citations omitted).

Furthermore, noted Judge Aldisert, Pennsylvania civil procedure rule 128(c) mandates that Pennsylvania courts avoid constitutional questions when possible. *Id.* at 70. Second, according to the dissent, the majority failed to realize that its interpretation of the Pennsylvania rules is only a prediction of how the state courts will answer the questions presented. *Id.* at 70 (Aldisert, J., dissenting). "The court's 'tentative answer . . . may be displaced tomorrow by a state adjudication. . . .'" *Id., citing* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941) (citations omitted). Third, Judge Aldisert admonished the majority for attributing the Philadelphia rules to the entire state of Pennsylvania. 634 F.2d at 70 (Aldisert, J., dissenting).

93. 634 F.2d at 71-72 (Aldisert, J., dissenting). While the dissent agreed that *Endicott* was not controlling because it did not address a debtor's ability to claim exemptions from process, Judge Aldisert felt that the majority failed to give proper weight to the prejudgment/postjudgment distinction between *Endicott* and *Sniadach* and its progeny. *Id.* at 72 (Aldisert, J., dissenting), *citing* Brown v. Liberty Loan Corp., 539 F.2d at 1366. Not only were a proper hearing and notice provided under Pennsylvania law, Judge Aldisert asserted, but the judgment creditor's interest shifts the scales in his favor. 634 F.2d at 72 (Aldisert, J., dissenting). Judge Aldisert also took issue with the expansiveness of the majority's relief, stating that "the particularized interest of the individual in this case [in being able to exert exemptions over funds in bank accounts to meet her daily necessities] does not justify the wholesale invalidation of otherwise legitimate procedures used throughout the Commonwealth of Pennsylvania." *Id.*

94. 634 F.2d at 80 (Aldisert, J., dissenting). Judge Aldisert admonished that the majority's insistence that the rules specify a "prompt" or "immediate" hearing on exemption claims "places a fetish on form that the Supreme Court has explicitly rejected . . . ." *Id. citing* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Judge Aldisert noted that the Louisiana procedure under attack in *Mitchell* did not utilize the word "promptly" nor did it specify a certain period for the adjudication of the debtor's claim, yet, the Court implied an immediate hearing. 634 F.2d at 80-81 (Aldisert, J., dissenting), *citing* 416 U.S. at 606. For a discussion of *Mitchell,* see notes 25-29 and accompanying text *supra*. Judge Aldisert would opt for a similar interpretation of Pennsylvania law — one that would "receive judicial construction consistent with the constitution." 634 F.2d at 81 (Aldisert, J., dissenting).

and adequate postseizure notice [95] and a "prompt" [96] postseizure hearing in which exemption claims could be asserted.[97] Finally, the judge

95. 634 F.2d at 81 (Aldisert, J., dissenting). Judge Aldisert noted the garnishee's duty to promptly foward a copy of the writ of attachment and its answers to interrogatories to the debtor. *Id.* at 73 (Aldisert, J., dissenting), *citing* PA. R. CIV. P. 3140(a), (b). Compliance with rules 3140(a) and (b) absolves the garnishee of its common law duty to resist the attachment. *Id.* at 73 (Aldisert, J., dissenting). Therefore, the dissent concluded, the procedures are adequate to notify the debtor of the garnishment. *Id.* at 74 (Aldisert, J., dissenting).

The dissenting opinion also took issue with the majority's holding that failure to provide notice of only two of the numerous available exemptions under Pennsylvania law, constituted a violation of due process. *Id.* at 82 (Aldisert, J., dissenting). *See* 42 PA. CONS. STAT. ANN. §§ 8123(a), 8124, 8127(a) (Purdon 1979). Judge Aldisert argued that the real effect of the majority's holding was that a debtor must be notified of the existence of *all* available exemptions. 634 F.2d at 82 (Aldisert, J., dissenting). The Judge reasoned that there is no reason for excluding some exemptions while including others in the notice. *Id.* According to the judge, the requirement that the notice also set forth the procedures for claiming exemptions creates "a veritable Frankenstein, a complicated procedure that far exceeds the hurt it is designed to heal and will, in the end, prove counterproductive." *Id.* at 84 (Aldisert, J., dissenting). The dissenting opinion charged that such a requirement failed to comport with "the simple notice the Supreme Court recommended in another context," *Id., citing* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13-15 (1978). For a brief discussion of *Memphis Light, see* note 86 *supra.* Judge Aldisert concuded by admonishing the majority for their failure to supply neither legislative nor judicial precedent in requiring, as a matter of federal constitutional law, the use of an "untested theory." 634 F.2d at 84 (Aldisert, J., dissenting). For a discussion of the majority's stance on this issue, *see* notes 83-86 and accompanying text *supra.*

96. *See* note 94 *supra.*

97. 634 F.2d at 73-74 (Aldisert, J., dissenting). To support his position, Judge Aldisert relied on H. GOODRICH & P. AMRAM, STANDARD PENNSYLVANIA PRACTICE: PROCEDURAL RULES SERVICE WITH FORMS (2d ed. 1977) [hereinafter cited as "GOODRICH — AMRAM"]. According to GOODRICH — AMRAM, the attachment rules must be understood against the background of the foreign attachment rules. 634 F.2d at 74 (Aldisert, J., dissenting), *citing* 4 GOODRICH — AMRAM, *supra,* § 1251:1. *See* also 9 GOODRICH — AMRAM, *supra,* § 3123:1, at 278. According to the rules, exempt property is not affected by the attachment. 634 F.2d at 75 (Aldisert, J., dissenting). Furthermore, the garnishee retains responsibility for the exempt property. *Id. See* 4 GOODRICH — AMRAM, *supra,* § 1268 (a):1, at 217. Because of the garnishee's responsibility for the assertion of exemption claims and the prompt notice of the garnishment provided to the debtor, Judge Aldisert reasoned that a debtor can obtain a factual determination of the validity of her exemption claims before the creditor acquires the property. 634 F.2d at 75 (Aldisert, J., dissenting), *citing* Zeitchick Estate v. Zeitchick, 215 Pa. Super Ct. 106, 109, 257 A.2d 371, 373 (1969).

Judge Aldisert also took issue with the majority's analysis of rule 3123. 634 F.2d at 75-76 (Aldisert, J., dissenting). For a discussion of the majority's analysis of rule 3123, *see* note 85 *supra.* Foremost among Judge Aldisert's criticisms was the majority's assumption that the rule was not applicable to garnishment of bank accounts. 634 F.2d at 75-76 (Aldisert, J., dissenting). Contrary to the findings of the majority, the dissent noted that the sheriff *did* have a role in the garnishment of intangibles such as bank accounts. *Id.* at 76 (Aldisert, J., dissenting). Judge Aldisert reasoned that "[i]t is certainly not inconceivable that a debtor desiring to claim an exemption could approach the sheriff and have the garnishment order dissolved." *Id.* To support this prop-

found that there had been no violation of the supremacy clause in light of the fact that, under Pennsylvania law, social security funds are exempt from attachment.[98]

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osition, the dissent cited two Pennsylvania cases decided prior to the promulgation of the rules then in effect. *Id.* at 76, 79 (Aldisert, J., dissenting), *citing* Bancord v. Parker, 65 Pa. 336, 337-38 (1870); Hild Floor Mach. Co. v. Rudolph, 156 Pa. Super. Ct. 102, 103, 39 A.2d 457, 458 (1944). Lacking explicit judicial authority construing the rule, the dissent sought the guidance of the commentaries which suggest that rule 3123 provided a simplified procedure for the assertion of an exemption claim. 634 F.2d at 76, 77 & n.15 (Aldisert, J., dissenting), *citing* 9 GOODRICH — AMRAM, *supra,* § 3123:1; commentary preceding PA. R. CIV. P. 3101, at 316 (Purdon 1975). Furthermore, noted Judge Aldisert, the commentaries contained no indication that the rule was *not* to be utilized where the property was not held by the sheriff in preparation for a judicial sale. 634 F.2d at 77 (Aldisert, J., dissenting). The dissent agreed with the district court that the procedure under rule 3123 was quick and simple, noting the 48 hour deadline for judicial review of the sheriff's decision to release property claimed to be exempt. *Id. See* PA. R. CIV. P. 3123(d); 9 GOODRICH — AMRAM, *supra,* § 3123(d):1. *See also* 461 F. Supp. at 262; note 85 *supra.*

Finally, Judge Aldisert defended rule 3121. 634 F.2d at 77-79 (Aldisert, J., dissenting). According to the judge, the majority confused petitions practice with motions practice. *Id.* at 77 (Aldisert, J., dissenting). For a discussion of the majority's viewpoint on this issue, *see* note 85 *supra.* Judge Aldisert claimed that the language of rule 3121 suggested that a court could grant immediate relief to a debtor claiming an exemption upon *application* to the court. 634 F.2d at 77 (Aldisert, J., dissenting). The dissent noted that while a petition "is in the nature of a complaint or a declaration", a motion is an extremely informal procedure that need not be in writing. *Id.* at 79 (Aldisert, J., dissenting). Furthermore, noted the dissent, motion or application procedures are more expeditious than petition practice. *Id.*

98. 634 F.2d at 81 (Aldisert, J., dissenting), *citing* Mellon Nat'l Bank & Tr. Co. v. Cole, 118 Pitts. L.J. 298 (Allegheny Cty. C.P. 1970). The judge deferred to the district court's disposition of the supremacy clause issue. 634 F.2d at 82 (Aldisert, J., dissenting). For a discussion of the majority's disposition of this issue, *see* notes 87-91 and accompanying text *supra. See* 461 F. Supp. at 257-58. Also dissenting, Judge Weis essentially concurred with Judge Aldisert; he was especially troubled by the majority's notice requirement. 634 F.2d at 93-94 (Weis, J., dissenting).

Subsequent to the *Finberg* decision the Pennsylvania Supreme Court amended Rules 3108, 3123(d), 3142(a), 3252 and adopted Rule 3123:1. *See* note 85 *supra.*

Rule 3108 was amended to provide a dual form of notice to the judgment debtor. Under new Rule 3108(d), the writ of execution containing the requisite notice under amended Rule 3252 will be mailed to the debtor by the sheriff. In addition, present Rule 3141 requires notice from the garnishee if the garnishee is to avoid any duty to resist the attachment or defend the action. *See* Explanatory note following Rule 3108.

Rule 3123.1 was promulgated in order to provide the judgment debtor with the opportunity to claim exemption or immunity of property and to demand the prompt hearing guaranteed by the *Finberg* case. Under Rule 3123.1, it is the sheriff's duty to notify the plaintiff, the garnishee and the court of the filing of the exemption claim. Subsection (b) of Rule 3123.1 mandates that the court shall hear the claim within five business days after the filing of the claim and shall promptly dispose of the matter.

Rule 3252 was amended to include, as part of the form of the writ of execution, notice of the available major exemptions, a "Claim of Exemption" form to be executed by the judgment debtor and filed with the sheriff, and notice of where to obtain legal advice. *See* Explanatory note following

Reviewing the court's decision, it is submitted that, while for the most part their conclusions were justified, the court's analysis and reasoning were cursory.[99] It is suggested that central to the analysis of the due process requirements in the postjudgment context is the continuing validity and applicability of the *Endicott* rationale, since *Endicott* denied stringent due process protections *prior* to postjudgment seizure.[100] Although the *Finberg* majority properly discounted the applicability of *Endicott* in this action,[101] it is submitted that, in adopting the rationale of *Sniadach* and its progeny for prejudgment attachments,[102] the court failed to elaborate upon various factors which tend to diminish the continuing validity of the *Endicott* theory of constructive notice in the context of postjudgment attachments,[103] especially as applied to the

Rule 3108, Forms following Rule 3252(a). For a further analysis of the new rules, *see* Explanatory note following Rule 3108.

After the promulgation of the new rules, the defendants petitioned the Third Circuit to vacate its judgment on the ground that, as a result of the new rules, the case was now moot and that further proceedings in the district court, as required by the Third Circuit's mandate, were unnecessary. Finberg v. Sullivan, No. 79-1129, slip op. at 3 (3d. Cir., May 11, 1981) (en banc) (denial of defendant's Motion for Vacation of Judgment). In refusing to vacate the judgment, the Third Circuit, through Judge Adams, found that the case was not moot since Finberg was still entitled to a hearing in the district court on the issue of class certification as well as a review of whether the new rules in their operation satisfied the test enunciated in the court's earlier opinion. *Id.* slip op. at 9-11.

Judge Weis dissented, arguing that the case was mooted by the enactment of the new rules. *Id.* slip op. at 15-19 (Weis, J., dissenting). Judge Aldisert did not participate in the consideration of the decision. *Id.* slip op. at 1.

99. *See* notes 103-07, 117-19 & 123-25 and accompanying text *infra.*

100. For a discussion of *Endicott, see* notes 35-38 and accompanying text *supra.* For the majority's views on *Endicott, see* notes 67-69 and accompanying text *supra.* For the dissenting viewpoint of Judge Aldisert, *see* note 93 and accompanying text *supra.*

101. It is submitted that *Endicott* was properly distinguished on the ground that *Finberg* involved the existence of a statutory exemption from garnishment. The validity of a defense such as an exemption claim is one that is not considered during the action on the indebtedness. Therefore, it is submitted, the debtor should be protected from erroneous attachment of property which is exempted from seizure. For a discussion of the majority's rationale on this issue, *see* notes 69-75 and accompanying text *supra.* For a discussion of additional factors tending to diminish the continuing validity of *Endicott, see* notes 103-07 and accompanying text *infra.*

102. 634 F.2d at 57-58. For the citations to *Sniadach* and its progeny, *see* note 19 *supra.* It is suggested that Chief Judge Seitz' finding that the prejudgment cases were controlling, was correct. *See* notes 70-75 and accompanying text *supra. See also* Brown v. Liberty Loan Corp., 539 F.2d at 1363-68; note 52 and accompanying text *supra;* Finberg v. Sullivan, 461 F. Supp. at 258-59;; Betts v. Tom, 431 F. Supp. at 1374-76, note 63 and accompanying text *supra. See generally* Alderman, *supra* note 16; Countryman, *The Bill of Rights and The Bill Collector,* 15 ARIZ. L. REV. 521, 543-45 (1973); Greenfield, *supra* note 19.

103. For the text of the *Endicott* theory of constructive notice, *see* note 38 *supra.*

present case[104] which involved the question of whether a judgment debtor should be granted adequate procedures to guard against the wrongful deprivation of exempted property.[105] It should be noted that the issue of exempt property did not arise in *Endicott*.[106] Further-

104. It is submitted that the decision in *Griffin* is one such factor. For a discussion of *Griffin*, see notes 39-43 and accompanying text *supra*. As the majority opinion in *Griffin* made no reference to *Endicott*, it is submitted that the *Griffin* Court ignored the apparent inconsistency between the two cases. While both cases involved the question of postjudgment/preseizure notice and hearing, the *Endicott* and *Griffin* cases reached opposite results. *See* Dunham, *supra* note 19, at 82; notes 35-43 and accompanying text *supra*.

While the Court in Hanner v. De Marcus, 390 U.S. 736 (1968) (dismissal of certiorari), declined to consider whether *Endicott* should be overruled, the dissent to the dismissal of certiorari, it is submitted, gives us some indication of which direction the Court is likely to go. *See* note 44 and accompanying text *supra*. Three dissenters concluded that Griffin effectively rejected *Endicott* and its contructive notice theory. 390 U.S. at 741-42 (Douglas, J., dissenting from dismissal of certiorari). Furthermore, they noted that the *Endicott* rationale had been diluted by the court's new approach to due process. *Id* at 741 (Douglas, J., dissenting from dismissal of cartiorari).

The Court in *Moya v. De Baca* also refused to consider the continued vitality of *Endicott*. *See* note 44 and accompanying text *supra*. However, commentators believe that the decision in *Moya* was based on the insubstantiality of the federal question presented and that the Court is merely waiting for a "better" case before considering whether to overrule *Endicott*. *See* Kennedy, *supra* note 44, at 175 n.67; Levy, *Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in Light of the English Experience*, 5 CONN. L. REV. 399, 435 & n.185 (1972-73). In this regard it should be noted that "the plaintiffs [in *Moya*] had actual notice of the garnishment, were represented by counsel, and made no attempt to claim their exemptions." Levy, *supra*, at 435 n.184, *citing* Moya v. De Baca, 286 F. Supp. 606, 608 (D.N.M. 1968) (three judge court) (emphasis added), *appeal dismissed*, 395 U.S. 825 (1969) (per curiam). It should also be noted that summary decisions are generally considered to be of doubtful precedential value. *See* Edelman v. Jordan, 415 U.S. 651, 671 (1974).

It is submitted that an additional factor may be the new approach that the court has taken to the requirements of due process. It is suggested that in addition to the cases cited by Justice Douglas in his *Hanner* dissent, *Sniadach* and its progeny provide a suitable framework for a postjudgment due process analysis. *See* 390 U.S. at 741 (Douglas, J., dissenting from dismissal of certiorari); note 44 *supra*. It should be noted also that Justices Harlan and Brennan would have remanded *Moya* for further consideration in light of *Sniadach*. 395 U.S. at 825 (Harlan, J., dissenting). Furthermore, the decisions not to hear *Hanner* and *Moya* came before the *Mitchell* ruling upholding *pre*judgment/*post*seizure procedures. For a discussion of *Mitchell*, *see* notes 25-29 and accompanying text *supra*. While many think it is unlikely that the Court would require *post*judgment/*pre*seizure hearing, it is felt that *at a minimum* due process requires adequate *postseizure* process. *See* Brown v. Liberty Loan Corp., 539 F.2d at 1368-69; Betts v. Tom, 431 F. Supp. at 1377-78; First Nat'l Bank v. Hasty, 410 F. Supp. 482, 490-91 (E.D. Mich. 1976). *See also* Alderman, *supra* note 16, at 17; Dunham, *supra* note 19, at 94. *See generally*, notes 47-49 and accompanying text *supra*.

105. For a further discussion of this issue, *see* note 101 *supra;* notes 106-07 and accompanying text *infra*.

106. *See* 266 U.S. at 285. The New York statute considered in *Endicott* authorized the garnishment of only 10% of a debtor's wages, and the judgment creditor only claimed this amount, consequently not more than 10% of the

more, it is submitted that, as three Supreme Court Justices have recognized, a judgment debtor should be granted due process protections to enable him to assert those defenses which would prevent the seizure of his property.[107]

Having properly discounted the applicability of *Endicott*,[108] it is suggested that the court was correct in applying the rationale of the Supreme Court's more recent due process cases concerning debtor-creditor relationships.[109] Notwithstanding the dissent's charges,[110] it is submitted that the court placed proper weight on the fact that, unlike *Sniadach* and its progeny, the present case concerned *post*judgment due process.[111] Judge Aldisert quoted the *Brown* court's finding that the judgment creditor's interest should prevail in his argument that the majority failed to take into account the pre/postjudgment distinction between the *Finberg* case and cases such as *Sniadach*.[112] However, it is submitted that Judge Aldisert himself failed to recognize an important distinguishing factor between *Brown* and *Finberg*. While the question in *Brown* was whether due process required *pre*seizure procedure, the *Finberg* court focussed solely on *post*seizure due process requirements.[113] It is submitted that the court's balancing of interest approach,[114] allowing the debtor to prevail in the postjudgment/post-

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debtor's wages were garnished. 266 U.S. at 286; Greenfield, *supra* note 19, at 888-89, 898. Therefore, as at least one commentator has suggested, *Endicott* perhaps may be inadequate authority where a judgment debtor has been deprived of arguably exempt property. Greenfield, *supra* note 19, at 889.

107. As Justice Douglas queried in his dissent to the dismissal of certiorari in *Hanner v. DeMarcus:* "Is there any more reason to accept in this case the *Endicott* fiction of constructive notice because of knowledge of the underlying judgment than there was in *Griffin?*" 390 U.S. 736, 742 (1968) (Douglas, J., dissenting from dismissal of certiorari). It is submitted that, as Justice Douglas suggested, a judgment debtor should be permitted to assert those defenses which would prevent the seizure of some, if not all of his property. It is suggested that this argument is especially forceful here where an exemption from execution, unrelated to those defenses asserted to the merits of the case which determined the amount of the debt, is being asserted. *See* Dunham, *supra* note 19, at 83-84; Greenfield, *supra* note 19, at 897-98.

108. *See* notes 101-07 and accompanying text *supra.*

109. *See* notes 70-75 and accompanying text *supra.* For a discussion of these cases, *see* notes 19-34 and accompanying text *supra.*

110. 634 F.2d at 71-72 (Aldisert, J., dissenting). *See* note 93 and accompanying text *supra.*

111. For a discussion of the majority's reasoning in applying the *Sniadach* line of cases, *see* notes 71-75 and accompanying text *supra.*

112. 634 F.2d at 72 (Aldisert, J., dissenting). For a discussion of *Brown, see* notes 50-54 and accompanying text *supra.*

113. *See* 634 F.2d at 59; Brown v. Liberty Loan Corp., 539 F.2d at 1357; note 80 and accompanying text *supra.*

114. The balancing-of-interests test in the due process context is derived from Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), and Matthews v. Eldridge, 424 U.S. 319 (1976). For a discussion of *Mitchell, see* notes 25-29 and accom-

seizure context, reached an equitable accommodation of the competing interests.[115] While it is conceded that the scales tip in favor of the creditor when *pre*seizure procedures are requested, the debtor's interests should prevail in the *post*seizure context; the seizure of the property prevents the debtor from destroying, concealing, or disposing of the property while adequate notice of exemption claims and a prompt postseizure hearing will ensure against the wrongful deprivation of debtor's property which may be subject to a valid exemption claim.[116] However, it is contended that in reaching its balancing of interests the court failed to analyze all of the interests involved.[117] Most importantly, the court failed to note that creditors as well as debtors have an interest in the prompt determination of the validity of exemption claims.[118] It is submitted that the creditor has an interest in seizing only those items which are properly subject to seizure; if exempt property is taken from the debtor, the additional delay before the writ of garnishment is quashed and the creditor can start the garnishment process on the debtor's other property will cause further delays and expenses, thereby diminishing the creditor's ultimate recovery.[119]

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panying text *supra*. For the text of a statement of the test by the *Matthews* Court, *see* note 76 *supra*.

115. For a discussion of the factors used in balancing the respective interests of debtor and creditor, *see* notes 77-78 and accompanying text *supra*.

116. The *Finberg* majority noted that the notice and an opportunity to be heard before attachment are not absolutely necessary. 634 F.2d at 58. However, the procedures must afford the debtor adequate safeguards against erroneous or arbitrary seizures. *Id.* It is submitted that this statement reflects a proper application of the *Mitchell* "adequate procedural safeguard" rationale from the prejudgment/postseizure to the postjudgment/postseizure context. It should be noted that even in *Brown* and *Raigoza* which upheld postjudgment garnishment statutes, the courts found that there were adequate *post*seizure safeguards. For a discussion of these cases, *see* notes 49-60 and accompanying text *supra*.

117. It is suggested that the creditor has additional interests which the majority failed to discuss. *See* Betts v. Tom, 431 F. Supp. at 1376. The creditor has an interest in prompt enforcement of his judgment; not only do amounts expended to recover the judgment diminish the creditor's ultimate recovery, but any significant delay will, in time of inflation, lead to further loss. *Id.* at 1375. It is submitted that the creditor also has an interest in execution of the judgment before the debtor, having already lost in court, can dispose of his assets. *Id.* at 1375-76. It is suggested that the state's interests are neutral. *Id.* The existence of the exemption clearly shows that the state has an interest in ensuring that exempt funds are not garnished. *Id.* at 1376. Likewise, it is submitted, the state favors prompt satisfaction of judicially validated claims in order to facilitate commercial transactions. *See* Greenfield, *supra* note 19, at 910-15. For a discussion of an additional factor which the majority failed to consider, *see* text accompanying note 119 *infra*. For a discussion of the factors which were used by the *Finberg* court in balancing the interests of the debtor and creditor, *see* notes 77-78 and accompanying text *supra*.

118. *See* Betts v. Tom, 431 F. Supp. at 1375.

119. *See id.;* Greenfield, *supra* note 19, at 910-15.

While the Pennsylvania procedures may have been *designed* to provide for a prompt postseizure hearing,[120] it is further submitted that the present case demonstrated how poorly the rules failed in their operation and effect due to the length of time required to release the exempted funds from attachment.[121] It is contended that a five-month

120. *See* 634 F.2d at 72-79 (Aldisert, J., dissenting); notes 96-97 and accompanying text *supra*. While Judge Aldisert was thorough in his analysis of Pennsylvania's then applicable procedural rules, it is submitted that he has overlooked a number of important factors. It should be noted that the judge was correct in his recognition that a debtor could obtain a factual determination of the validity of his or her exemption claims before the creditor acquired the property. However, it is contended, Judge Aldisert failed to realize that the issue here was not *who* was holding the garnished funds but for *how long* the debtor was deprived of the funds before the validity of the debtor's exemption claims could be determined.

It is submitted that Judge Aldisert's disposition of rule 3123 was essentially correct; while on the surface the rule seemed not to apply to the garnishment of assets such as bank accounts, the commentators are especially convincing in discrediting the majority's viewpoint on the issue. *See* 9 GOODRICH — AMRAM, *supra* note 97, § 3123, at 276-84. For a discussion of the majority's viewpoint, *see* note 85 *supra*. Nonetheless, it is submitted that Judge Aldisert overlooked an important factor. Rule 3123(d) provided for a 48 hour period in which the debtor could seek review of the sheriff's appraisal or designation of property. PA. R. CIV. P. 3123(d). Contrary to the dissent's belief, it is contended that this rule does not provide for an actual hearing within such time. In the case *sub judice* for example, it took some 20 days to determine Finberg's entitlement to the general Pennsylvania exemption after the court was petitioned. *See* note 7 *supra*.

It is contended that, as Judge Aldisert charged, the majority placed undue importance on the absence of the word "prompt," at least in the specification of a certain period in which the exemption claim must be adjudicated. *See* note 94 *supra*. However, it is contended that the position of the majority was hardened by the failure of the rules, despite their intended flexibility and simplicity. On the issue of "prompt" procedures, it is also interesting to note the statute upheld in *Raigoza*. For a discussion of *Raigoza, see* notes 55-60 and accompanying text *supra*. The California court in *Raigoza* was adamantly opposed to the application of the *Sniadach* line of cases to the postjudgment context. Raigoza v. Sperl, 34 Cal. App. 3d at 564, 567, 110 Cal. Rptr. at 298-99, 301. However, the statute under attack in *Raigoza* provided a defined period in which exemption claims had to be adjudicated. *Id.* The statute in *Raigoza* required the debtor to file a claim of exemption within ten days of the date of levy. *Id.* at 564, 110 Cal. Rptr. at 298-99. Furthermore, the debtor's notice informed him of the existence of possible exemptions. *Id.* at 562, 110 Cal. Rptr. at 298. For a discussion of the probable scope of notice required by the *Finberg* court, *see* notes 123-25 and accompanying text *infra*. The creditor in *Raigoza* had five days to oppose the claim of exemption or else the property would be released. 34 Cal. App. 3d at 564, 110 Cal. Rptr. at 299. Subsequently, one party must seek a hearing within five days of the creditor's counteraffidavit; a hearing must be scheduled within 15 days of the motion. *Id.* Thus, on an unopposed claim of exemption, the debtor's deprivation of property lasts approximately two weeks; on a contested claim the debtor will be deprived for about five weeks. *Id.* It is suggested that procedures such as California's, rather than the confusing Pennsylvania rules, are better designed to provide *guaranteed* "adequate procedural safeguards" for debtors and creditors alike. For a discussion of other favorable provisions under the statute analyzed in *Raigoza, see* note 125 *infra*.

121. *See* note 7 *supra*. It should be noted that it took the common pleas court 20 days to determine that Finberg was entitled to the $300 general

delay in establishing the validity of a claimed exemption fails to provide "due process of law";[122] surely such a delay cannot rationally be deemed "prompt". Additionally, the dissent may have been correct in concluding that the scope of the majority's notice requirement establishes an unwieldy burden by requiring notice of the numerous procedures which may be employed in the claiming of a statutory exemption.[123] The majority's requirement of notice of the *procedures* required to claim an exemption, it is submitted, would clearly be too burdensome, especially here where there is already much confusion as to what procedures may be utilized and how those procedures operate.[124] Furthermore, as there are numerous exemptions under Pennsylvania law, it is submitted that the majority's requirement of notice of two specific exemptions would eventually lead to the requirement of notice of all exemptions.[125] It is nonetheless contended that the notice pro-

exemption under Pennsylvania law. 634 F.2d at 52. *See* 42 PA. CONS. STAT. ANN. § 8123(a) (Purdon 1979). Furthermore, it took four months for Sterling to take Finberg's deposition. 634 F.2d at 52. While Sterling immediately agreed to release the remaining funds, it took another two weeks to get a court order to that effect, and over a month longer before the funds were finally released by the garnishee. *Id.* It is submitted that, contrary to Judge Aldisert's beliefs, such delay in the determination of an exemption claim is far from prompt.

122. U.S. CONST. amend. XIV.

123. For a discussion of Judge Aldisert's analysis, *see* notes 95-97 and accompanying text *supra*. The Supreme Court has long required "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950). The Court reiterated this principle in Armstrong v. Manzo, 380 U.S. 545, 552 (1965). For the relevant language, *see* note 14 *supra*. For a brief discussion of the Supreme Court's recent expansion of the scope of the notice requirement, *see* note 44 *supra*.

It is submitted that the scope of the majority's requirement may have gone beyond what the Supreme Court had in mind in Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978). For a discussion of *Memphis Light*, *see* note 86 *supra*.

124. For a discussion of the diverging views of the majority and dissenting opinions, *see* notes 83-86 & 94-97 and accompanying text *supra*.

125. *See* 634 F.2d at 82 n.26 (Aldisert, J., dissenting); 42 PA. CONS. STAT. ANN. §§ 8123, 8124, 8127 (Purdon 1979). It is suggested that, as Judge Aldisert noted in his dissent, this requirement might prove too burdensome to both the creditor and the state. *See* 634 F.2d at 83-84 (Aldisert, J., dissenting); note 95 *supra*. However, it is suggested, the majority's requirement could be satisfied through a more limited notice of the existence of the various statutory exemptions. For instance, the California procedures under attack in Raigoza v. Sperl specified that the writ of execution

> must be in a specified form, which includes a notice to the judgment debtor that he "may be entitled to file a claim exempting [his] property from execution." The form states that the claim must be filed "within ten days from the date [the] property was levied upon" and advises the debtor that if he wished to consult an attorney, he should do so promptly so that an affidavit, if any, may be filed on time.

vided to plaintiff Finberg was inadequate as it was not "reasonably calculated" to afford the plaintiff an opportunity to claim her statutory exemptions.[126]

Furthermore, because the analysis of both the due process and supremacy clause issues entailed an analysis of the effect and operation of Pennsylvania's postjudgment garnishment procedures,[127] it is submitted that the majority's analysis of the supremacy clause issue properly followed from the treatment accorded to the due process issues.[128] It is submitted, moreover, that in light of such analysis, the Pennsylvania rules were correctly held to be violative of the supremacy clause.[129] Despite the Pennsylvania courts' recognition of the social security exemption,[130] "the net effect of Pennsylvania's postjudgment garnishment procedures *is* to . . . [frustrate the] 'purposes and objectives of Congress'" in its enactment of the social security benefit exemption.[131]

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34 Cal. App. 3d at 562, 110 Cal. Rptr. at 298 (citation omitted). It is submitted that such a requirement would provide a workable accommodation between the majority and dissenting opinions. For a discussion of other favorable provisions under the California statute analyzed in *Raigoza, see* note 120 *supra.*

126. Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306 314 (1950). For a discussion of the Supreme Court's recent expansion of the requirement of the adequacy of notice, *see* note 44 *supra. See also* notes 84-86 and accompanying text *supra.*

127. For a further discussion of the majority's analysis in *Finberg, see* notes 79-91 and accompanying text *supra.*

128. The majority's due process analysis focused on the operation or effect of Pennsylvania's postjudgment garnishment procedures. 634 F.2d at 59-62. *See* notes 80-86 and accompanying text *supra.* Chief Judge Seitz' supremacy clause analysis stemmed from the approach taken in Perez v. Campbell, 402 U.S. 637 (1971), where the Supreme Court analyzed the purposes of the federal statute, as well as the *effect* of the state statute. *See* 634 F.2d at 63; notes 90-91 and accompanying text *supra.*

129. *See* note 128 and accompanying text *supra.* It is submitted that the purpose of the Pennsylvania garnishment statute does not conflict with the social security exemption. *See* Finberg v. Sullivan, 461 F. Supp. at 258. However, whether or not the exemption has been recognized by the Pennsylvania courts, the garnishment statute *in its effect* conflicted with the Social Security Act exemption, 42 U.S.C. § 407 (1976). It is suggested that under due process analysis, a debtor under Pennsylvania law receives inadequate notice and hearing after his property has been attached, thereby thwarting the purpose of the federal exemption in its *effect.* In the present case, for example, Finberg was deprived of her social security benefits which were garnished in her bank account for a period of over five months. 634 F.2d at 52. *See* note 7 *supra.*

130. Mellon Nat'l Bank & Tr. Co. v. Cole, 118 Pitt. L.J. 298 (Allegheny Cty. C.P. 1970). It is submitted that contrary to Judge Aldisert's findings, the majority's analysis was straightforward. *See* 634 F.2d at 81-82 (Aldisert, J., dissenting). After noting that the effect of Pennsylvania's procedures frustrated the purpose of exempting social security benefits from execution, the court simply noted that Pennsylvania's mere recognition of the exemption did not alleviate the frustration of that purpose. 634 F.2d at 63.

131. 634 F.2d at 63 (emphasis added), *quoting* Hines v. Davidowitz, 312 U.S. 52, 67 (1941). *See* notes 90-91 and accompanying text *supra.*

The Third Circuit's opinion in *Finberg*, it is submitted, has already had a far reaching impact on debtor-creditor relationships in Pennsylvania.[132] The *Finberg* decision has resulted in revisions to the Pennsylvania postjudgment garnishment rules concerning the resolution of statutory exemption claims.[133] At a minimum, the decision will be limited to its narrow holding. However, it is contended that the majority's attempt to limit its notice requirement to the general $300 exemption and the social security exemption, only two of the numerous possible exemptions, will be fruitless.[134] The holding is, as the dissent has charged, likely to be expanded to provide notice of all exemptions and the procedures for claiming them.[135] Furthermore, whereas a creditor's interests are protected by allowing the judgment debtor's property to be attached, the prompt hearing guaranteed by this decision will ensure that the judgment debtor's use and enjoyment of his property, needed for subsistence living, will be restored without undue delay.[136] The broader implication of the case may be felt sooner than expected as the district court applies the *Finberg* rationale to the newly enacted rules on remand.[137]

However, as Judge Aldisert argued in his dissent, the court's approach to the Pennsylvania postjudgment garnishment procedures may

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132. As Judge Weis noted in his dissent from the denial of defendants' Motion for Vacation of Judgment, "the majority decision . . . caused substantial disruption to long established commercial practices in [Pennsylvania]." Finberg v. Sullivan, No. 79-1129, slip op. at 19 (3d Cir. May 11, 1981) (en banc) (Weis, J., dissenting).

133. Subsequent to the *Finberg* decision, the rules were revised. For a further discussion of this development, *see* notes 85 & 98 *supra*. It is submitted that this result is far more comprehensible and desirable than the former hodgepodge of procedural rules arguably applicable to the claiming of statutory exemptions. *See* notes 81-86, 94-97 & 120-26 and accompanying text *supra*.

134. *See* notes 86, 95 & 124-26 and accompanying text *supra*.

135. *See* notes 95 & 125 and accompanying text *supra*. The Pennsylvania Civil Procedural Rules Committee recognized this in drafting the revisions. *See* Explanatory Note following Rule 3108.

136. *See* note 85 and accompanying text *supra*.

137. In this respect it is interesting to note the broad reading given to the original *Finberg* case by Judge Adams in his opinion denying the defendant's Motion for Vacation of Judgment. Finberg v. Sullivan, No. 79-1129 (3d Cir., May 11, 1981) (en banc). In discussing the issue of class certification upon remand to the district court, Judge Adams noted that:

> For example, if the district court certifies the class of all judgment debtors who have either *legal or equitable defenses* to garnishment of their personal property, it would have to consider whether the amended rules provide adequate hearings for debtors' assertion of *all* defenses. *On their face, the new rules appear to provide a prompt hearing only for debtors with exemption claims.* Moreover, because our opinion of October 27, 1980, addressed the hearing requirement in the context of Mrs. Finberg's claim that her Social Security bene-

be rendered meaningless by a subsequent interpretation by the Pennsylvania courts, since the Third Circuit's resolution is merely "tentative [and] may be displaced tomorrow by a state adjudication." [138] However, putting aside such hypothetical questions, it is submitted that the *Finberg* decision was correct. For although the Third Circuit's opinion may create some undesirable results, such as unwieldy notice requirements and probable expansion in the number of exemptions of which a debtor must be given notice,[139] it is nonetheless submitted that the case will have the effect of "minimiz[ing] substantively unfair or mistaken deprivation[s] of property . . . without due process of law reflect[ing] the high value, embedded in our constitutional and political

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fits were exempt from garnishment, the opinion will likely prove only limited guidance for the district court's resolution of the rights of other class members.

Id. slip op. at 9 n.11 (emphasis added).

It is submitted that if the tenor of Judge Adams' comments bear fruition in the district court, the Third Circuit's mandate in the original *Finberg* decision will have a far greater implication than the Pennsylvania Civil Procedural Rules Committee, or for that matter the Pennsylvania legal community, had anticipated.

138. 634 F.2d at 70 (Aldisert, J., dissenting), *quoting* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941). *See* note 92 *supra*. In addition, three factors create concern over whether the Supreme Court might hear on appeal a case such as *Finberg* even though the case creates a split among the circuits. Initially, however, it should be noted that the *Finberg* court reaches a result opposite to the Fifth Circuit's decision in *Brown v. Liberty Loan Corp.* For a discussion of *Brown, see* notes 50-54 and accompanying text *supra*. However, the court in *Finberg* conceded, as the court in *Brown* had previously held, that due process did not guarantee postjudgment/preseizure procedures. 634 F.2d at 58; Brown v. Liberty Loan Corp., 539 F.2d at 1368. The courts differed only in their interpretation of whether the state procedures in question had provided adequate procedural safeguards after seizure had taken place. Finberg v. Sullivan, 634 F.2d at 61-62; Brown v. Liberty Loan Corp., 539 F.2d at 1368.

The first factor mitigating against a grant of certiorari is that as noted previously, the Court has been reluctant to decide similar cases. For a discussion of these cases, *see* notes 44 & 104 and accompanying text *supra*. Second, one of the central issues in *Finberg* centered around an apparent confusion as to which Pennsylvania rules were applicable and how the rules should be interpreted; the Court may simply await a "better" case. *See* notes 81-86, 94-97 & 120-26 and accompanying text *supra*. Third, the Pennsylvania Supreme Court has declined to employ the *Endicott* construction notice rationale in Luskey v. Steffron, Inc., 461 Pa. 305, 336 A.2d 298 (1975), *aff'd on rehearing*, 469 Pa. 377, 366 A.2d 223 (1976), *cert. denied*, 430 U.S. 968 (1977) (court held unconstitutional Pennsylvania's procedures for the sale of real property in satisfaction of judgments; the law which permitted notice by publication in local newspapers and by the posting of handbills on the property failed to provide adequate notice even though there was no statutory exemption for real property). *See* note 48 *supra*; Greenfield, *supra* note 19, at 890. However, such a decision is largely academic as the defendants have abandoned their opportunity to seek Supreme Court review; the time period for the docketing of an appeal to the Court has expired. *See* Finberg v. Sullivan, No. 79-1129, slip op. at 1 n.1 (3d Cir. May 11, 1981) (en banc).

139. *See* notes 95, 123-26 & 134-35 and accompanying text *supra*.

history, that we place on a person's right to enjoy what is his, free of government interference." [140]

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140. Fuentes v. Shevin, 407 U.S. at 81 (citations omitted). It is submitted that, although *Fuentes* concerned prejudgment due process questions, all due process questions in the debtor-creditor area should be guided by this principle. For a discussion of the applicability of prejudgment cases such as *Fuentes* in the postjudgment context, *see* notes 70-75, 93 & 102 and accompanying text *supra*. For a general discussion of *Fuentes*, *see* notes 23-24 and accompanying text *supra*.

CONSTITUTIONAL LAW — STANDING — CITIZEN INTEREST IN THE ESTABLISHMENT CLAUSE HELD SUFFICIENT TO GIVE STANDING TO CHALLENGE AN ALLEGED VIOLATION OF THAT CLAUSE.

Americans United for Separation of Church & State, Inc. v. United States Department of Health, Education and Welfare (1980)

Pursuant to the Federal Property and Administrative Act of 1949 (Act),[1] the Department of Health, Education and Welfare (HEW) conveyed 77 acres of surplus government property, including buildings, fixtures, and equipment situated thereon, to Valley Forge Christian College (College), a sectarian institution.[2] Under the Act, the Secretary of HEW is required to grant discounts to transferees for any benefit accruing to the United States from the designated use of the transferred property.[3] In exchange for the College's agreement to use the conveyed property for educational purposes for thirty years, it was granted a 100% discount, thereby receiving the property for no monetary consideration.[4] Americans United for Separation of Church and State, Inc. (Americans United), on behalf of its members, and four of its directors, in their

1. 40 U.S.C. § 484(k)(1)(A) (1976). The pertinent portion of the Act provides:

> Subject to the disapproval of the Administrator [of General Services] . . . the Secretary of Health, Education, and Welfare, through such officers or employees of the Department of Health, Education, and Welfare as he may designate, may sell or lease such real property, including buildings, fixtures, and equipment situated thereon, for educational purposes to the states and their political subdivisions and instrumentalities, and tax-supported educational institutions, and to other non-profit educational institutions which have been held exempt from taxation under section 101(6) of title 26.

Id.

2. Americans United for Separation of Church and State, Inc. v. United States Dep't. of Health, Educ. and Welfare, 619 F.2d 252, 253 (3d Cir. 1980), *cert. granted,* 101 S. Ct. 1345 (1981). "[T]he college's primary purpose is to train leaders for church-related activities. Its curriculum is devoted to bible study, christian service, and theology." 619 F.2d at 253-54.

When Congress created the Department of Education in 1979, HEW was renamed the Department of Health and Human Services. *See* 5 U.S.C. § 101 (1976), *as amended by* Pub. L. No. 96-88, 93 Stat. 692 (1979). For purposes of this note, the agency will be referred to by its original designation.

3. 40 U.S.C. § 484(k)(1)(C) (1976). This section provides:

> In fixing the sale or lease value of property to be disposed of under subparagraph (A) . . . the Secretary of Health, Education, and Welfare shall take into consideration any benefit which has accrued or may accrue to the United States from the use of such property by any such state, political subdivision, instrumentality or institution.

Id. This allowance is further delineated in the Code of Federal Regulations. *See* 45 C.F.R. § 12.9(a) (1979).

4. 619 F.2d at 253. The total value of the property transferred to the college was stated to be $1,303,730.00 at the time of transfer. *Id.*

individual capacities, challenged HEW's transfer to a sectarian organization as violative of their individual rights as secured by the establishment clause of the first amendment.[5] Plaintiffs brought suit against HEW in the United States District Court for the Eastern District of Pennsylvania[6] seeking declaratory and injunctive relief to void the transfer of property, alleging "injury in fact" to its members through HEW's violation of their constitutional right to separation of church and state.[7] Americans United alleged that it was qualified to represent the interests of its members because its express purpose is "to defend, maintain and promote religious liberty and the constitutional principles of separation of church and state."[8]

The district court dismissed the suit,[9] holding that all plaintiffs lacked standing as taxpayers to challenge the allegedly invalid property transfer.[10] On appeal, the United States Court of Appeals for the Third Circuit[11] reversed and remanded,[12] *holding* that although plaintiffs lacked standing as taxpayers,[13] their interests as citizens in the establish-

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5. *Id.* at 254. The relevant portion of the first amendment provides that "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

The Supreme Court has been divided concerning what government acts violate the establishment clause. *See, e.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (5-4 decision upholding state grants to private colleges, including religiously affiliated institutions, subject to restriction that money not be used for sectarian purposes); Tilton v. Richardson, 403 U.S. 672 (1971) (5-4 decision upholding federal construction grants to colleges and universities for buildings and facilities used exclusively for secular educational purposes, including church-related institutions); Everson v. Board of Educ., 330 U.S. 1 (1947) (5-4 decision upholding reimbursement to parents for bus transportation of children to and from schools, including Catholic parochial schools).

6. Americans United for Separation of Church and State, Inc. v. United States Dept. of Health, Educ. and Welfare, No. 77-1321 (E.D. Pa. Dec. 15, 1978), *rev'd*, 619 F.2d 252 (3d Cir. 1980), *cert. granted*, 101 S. Ct. 1345 (1981).

7. 619 F.2d at 261.

8. 619 F.2d at 254. This purpose is expressed in Americans United's articles of incorporation. *Id.* Americans United is a non-profit tax-exempt organization claiming a membership of approximately 90,000. *Id.*

9. *Id.*

10. *Id.* The district court found that the only basis advanced by the individual plaintiffs and Americans United in support of their claim to standing was taxpayer status. *Id.* For a discussion of taxpayer status as a basis for standing, *see* notes 51-56 and accompanying text *infra*.

11. The case was heard by Judges Adams, Rosenn, and Weis. Judge Adams delivered the opinion of the court and Judge Rosenn wrote a concurring opinion. A dissenting opinion was filed by Judge Weis.

12. 619 F.2d at 266. The case was remanded for proceedings on the merits of the case. *Id.*

13. *Id.* at 254. The district court read the plaintiffs' pleadings as asserting only taxpayer standing. *See* note 10 *supra*. The Court of Appeals, however, saw the thrust of the plaintiffs' argument as asserting that they were

ment clause provided them with a sufficient personal stake in the controversy to vest them with standing to challenge an alleged violation of the clause. *Americans United for Separation of Church and State, Inc. v. United States Department of Health, Education and Welfare,* 619 F.2d 252 (3d Cir. 1980), *cert. granted,* 101 S. Ct. 1345 (1981).

The judicial concept that a litigant must have standing to sue emanates from Article III of the Constitution which limits the jurisdiction of the federal courts to "cases and controversies." [14] The requirement of standing, as a prerequisite to the court's exercise of jurisdiction, embodies both constitutional and jurisprudential aspects [15] in the principle that the individual seeking judicial resolution of a controversy must be a proper party to bring the suit.[16]

The law of standing has been construed to require that a plaintiff allege "such a personal stake in the outcome of the controversy as to assure that degree of concrete adverseness which sharpens the presentation of issues." [17] Adverseness is necessary because the court depends on the parties' representations and arguments in resolving the legal issues.[18] While the test for standing originally required the plaintiff to allege that the challenged government action infringed on a "legally

entitled to seek relief as citizens protected by the establishment clause. 619 F.2d at 254. For a discussion of the Third Circuit's holding that plaintiff lacked taxpayer standing, *see* note 58 and accompanying text *infra.*

14. U.S. CONST. Art. III, § 2, cl. 1. This clause provides:

> (1) The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

15. *See* Warth v. Seldin, 422 U.S. 490, 498-500 (1975). Both the constitutional and jurisprudential considerations encompassed by the concept of standing revolve around a concern about the proper role of the court. *Id.* at 498.

16. *See* Flast v. Cohen, 392 U.S. 83, 99-100 (1968). The *Flast* Court indicated that a proper party is necessary so that the federal courts will avoid deciding ill-defined constitutional issues. *See id.* at 100. For a discussion of the issue of who is a proper party to bring a suit, see notes 17-56 and accompanying text *infra.*

17. Baker v. Carr, 369 U.S. 186, 204 (1961) (Supreme Court upheld Tennessee residents' standing to challenge the constitutionality of a statute apportioning the members of Tennessee's general assembly among its counties, on the ground that the plaintiffs were seeking to protect an interest of their own, in asserting a violation of their fourteenth amendment right to equal protection of the laws).

18. *Id.*

protected interest",[19] modern developments have lowered the standing barrier.[20]

As first set forth in *Data Processing Service Organizations v. Camp* [21] and *Barlow v. Collins*,[22] current standing law requires that the plaintiff suffer "injury in fact" [23] to an interest which is "arguably within the zone of interests to be protected or regulated by the federal statute or constitutional guarantee in question." [24] While *Data Processing* and

19. *See, e.g.*, Perkins v. Lukens Steel Co., 310 U.S. 113 (1940) (standing denied to plaintiffs, government suppliers who were challenging an act which required that government suppliers agree to pay their employees the minimum wage, on the grounds that no legal rights of plaintiffs were invaded as the government may purchase from whomever it chooses); Tennessee Elec. Power Co. v. Tennessee Valley Authority, 306 U.S. 118 (1939) (standing denied to plaintiffs, corporations which generate and distribute electricity who were seeking to restrain the Tennessee Valley Authority from generating and selling electricity, on the grounds that no legal right of plaintiffs was violated as plaintiffs were not legally entitled to be free from competition); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938) (Standing denied to plaintiff, manufacturer and supplier of energy in Alabama who was contesting government loans to municipalities for the construction of light and power plants and claiming loss of business, on the grounds that plaintiff was not legally entitled to be free from competition).

As explained by Justice Frankfurter, the "legal interest" test requires that the plaintiff, in order to assert standing, must establish that the contested conduct was a wrong which harmed a legally protected interest of the plaintiff. Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring), *citing* Alabama Power Co. v. Ickes, 302 U.S. at 479; Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1936). As noted by Justice Frankfurter, this definition contains terms of art which may only be given meaning through an examination of the cases in which this test was applied. 341 U.S. at 152 (Frankfurter, J., concurring).

20. *See* notes 21-27 and accompanying text *infra*.

21. 397 U.S. 150 (1970). The plaintiffs in *Data Processing*, sellers of data processing services, challenged a ruling which allowed banks to make data processing services available to their customers and other banks, alleging that this competition would cause them a loss in profits. *Id.* at 151-52. The Court upheld standing, finding that the lost profit was sufficient injury in fact and that the plaintiffs' interests were arguably within the zone of interests protected by the applicable law. *Id.* at 151-56.

22. 397 U.S. 159 (1970). This case was decided on the same day as *Data Processing*. *Id.* at 159. Justice Douglas, writing for the Court, as he did in *Data Processing*, upheld standing under the *Data Processing* test. *Id.* at 163-67.

23. Data Processing Serv. Orgs. v. Camp, 397 U.S. at 152. In establishing the "injury in fact" test, Justice Douglas rejected the "legal interest" test as going to the merits of the case. *Id.* at 153. For a discussion of the legal interest test, *see* note 19 *supra*.

24. 397 U.S. at 153. Justice Brennan, joined by Justice White, while concurring in the result, wrote a dissenting opinion applicable to both *Barlow* and *Data Processing* which favored a more liberal standing approach than that presented by Justice Douglas. *Id.* at 167-73 (Brennan, J., concurring in part and dissenting in part). Justice Brennan rejected the two-prong approach of Justice Douglas, proposing that the plaintiff should only have to meet the first test of "injury in fact" in order to have standing. *Id.* at 168 (Brennan, J., concurring in part and dissenting in part). Justice Brennan felt that the "zone of interests" language of Justice Douglas' test is a nonconstitutional step, which, if included in the standing requirement, approaches

Barlow may be seen as having interpreted the standing requirements of the Administrative Procedure Act (APA),[25] *Simon v. Eastern Kentucky Welfare Rights Organization* [26] expressly stated that the "injury in fact" test was a constitutional limitation.[27]

The "injury in fact" test has been further refined by the additional requirement that the plaintiff establish "a causal connection between the claimed injury and the challenged conduct" [28] so that the court would be able to grant relief appropriate to redress the injury.[29] While this requirement has sometimes been imposed rigorously, at other times it has been imposed in a more relaxed form.[30]

Plaintiffs have attempted to assert standing solely on the basis of their right to a government which follows its constitutional provisions and statutes, but the Supreme Court has held that such citizen standing should be denied to plaintiffs asserting only a generalized grievance

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the rejected "legally protected interest" requirement. *Id.* For a further discussion of Justice Brennan's view, *see* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

25. *See* 397 U.S. at 357. Section 10 of the APA provides, in pertinent part, that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 5 U.S.C. § 702 (1976).

26. 426 U.S. 26 (1976). For a discussion of *Simon*, *see* note 30 *infra*.

27. *Id.* at 38-39. *Simon*, however, was also a case in which standing was asserted under § 10 of the APA. *Id.* at 38.

28. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978) (citation omitted); *Accord*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. at 38.

29. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 74 (1978), *citing* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. at 43.

30. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 3-21 (1978). *Compare* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) *with* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978). In *Simon*, indigent plaintiffs brought an action against the Secretary of the Treasury and the Commissioner of the Internal Revenue Service (IRS) asserting that the IRS had violated the Internal Revenue Code and the APA by issuing a Revenue Ruling allowing favorable tax treatment to a non-profit hospital that offered only emergency room services to indigents. 426 U.S. at 28. Each individual plaintiff alleged instances in which he had been denied hospital service because of his indigency. *Id.* at 32. The Supreme Court, however, denied the plaintiffs' standing to bring a suit on the basis that the connection between the plaintiffs' injury and the defendant's tax ruling was too tenuous and that it was speculative whether a favorable ruling by a court on the substantive issue in the case would result in the availability of more hospital services to the plaintiffs. *Id.* at 42-43.

In *Duke Power*, the plaintiffs, residents of North and South Carolina, challenged the constitutionality of a statute limiting the liability for damages caused by a nuclear accident, asserting that this statute would result in the construction of proposed nuclear power plants near them. 438 U.S. at 64-67, 72-73. The plaintiffs alleged that these power plants would harm their living and working environment. *Id.* at 72-73. The Supreme Court held that standing was appropriate in this case because there was sufficient support for the district court's finding that a "substantial likelihood" existed that the power plants would not be built, absent the challenged statute. *Id.* at 75-77.

"common to all members of the public." [31] The Court reasoned that such a grievance is not a sufficiently concrete injury to meet the "injury in fact" test.[32] The Court has recently applied this concept in *United States v. Richardson*,[33] in which it denied standing to the plaintiff's challenge to an alleged violation of the receipts and expenditures clause of the Constitution; [34] and in *Schlesinger v. Reservists Committee to Stop the War*,[35] in which it denied standing to the plaintiffs' challenge

31. *See, e.g.*, United States v. Richardson, 418 U.S. 166, 177 (1974), *quoting* Laird v. Tatum, 408 U.S. 1, 13 (1972); *Ex Parte* Levitt, 302 U.S. 633, 634 (1937).

32. United States v. Richardson, 418 U.S. 166, 177 (1974). For a discussion of *Richardson, see* notes 33-34 & 37-38 and accompanying text *infra*.

33. 418 U.S. 166 (1974). In *Richardson*, the plaintiff claimed that there were unconstitutional provisions in the Central Intelligence Act which prevented him from obtaining documents setting out the expenditures and receipts of the CIA. *Id.* at 169. *See* 50 U.S.C. §403(a)-403(j) (1976).

34. 418 U.S. at 167-68. This clause provides that a regular statement and account of the receipts and expenditures of all money withdrawn from the Treasury shall be published. U.S. CONST. art. I, § 9, cl. 7.

Justice Powell, concurring in *Richardson*, stated that he views taxpayer and citizen suits as an effort to use the federal courts to voice generalized grievances about government conduct or the allocation of power within the federal system. 418 U.S. at 196 (Powell, J., concurring). Justice Powell opposed the abolition of standing requirements, which he viewed as implicit in allowing a citizen to use the courts to negate unconstitutional acts of the federal government. *Id.* at 195 (Powell, J., concurring).

The defendant in *Richardson* had appealed from a decision of the Third Circuit which had held that the plaintiff had standing. Richardson v. United States, 465 F.2d 844 (3d Cir. 1972) *rev'd*, 418 U.S. 166 (1974). Judge Rosenn, in the Third Circuit's majority opinion, had stated that a plaintiff's "personal stake [in the outcome] may come from any injury in fact even if it is not directly economic in motive." 465 F.2d at 853, *citing* Data Processing Serv. Orgs. v. Camp, 397 U.S. at 154. Judge Adams, foreshadowing his opinion in *Americans United*, stated in a dissenting opinion that in determining whether standing is appropriate, the court must look to the importance of the asserted constitutional right and the nature of the injury suffered by the plaintiff. 465 F.2d at 871 (Adams, J., dissenting). For a discussion of Judge Adams' opinion in *Americans United, see* notes 57-74 and accompanying text *infra*. Judge Adams noted that standing to litigate questions concerning the establishment clause and other constitutional rights of paramount importance might be found in the absence of direct injury. 465 F.2d at 869 (Adams, J., dissenting). Judge Adams concluded, however, that the expenditures and receipts clause of the Constitution is not of paramount importance, as is the Bill of Rights, and that, as the plaintiff merely had a general interest common to all, he should not be granted standing. *Id.* at 872-73 (Adams, J., dissenting). For a discussion of the Supreme Court's view of the importance of the Bill of Rights, *see* note 44 and accompanying text *infra*.

35. 418 U.S. 208 (1974). In *Schlesinger*, the plaintiffs alleged that military reserve positions held by Congressmen violated the incompatibility clause by placing them under the possible influence of the Executive Branch and by placing inconsistent obligations upon them. *Id.* at 212. In denying standing, the Supreme Court held that the broadening of categories of cognizable injury does not mean that the Court has abandoned the requirement that plaintiff must himself have suffered an injury. *Id.* at 218, *citing* Sierra Club v. Morton, 405 U.S. 727, 738 (1972). For a discussion of *Sierra Club, see* note 42 *infra*.

to an alleged violation of the incompatibility clause.[36] The Court in *Richardson* also rejected the plaintiff's argument that citizen standing should be granted because there was no better plaintiff to bring the action.[37] The Court reasoned that the lack of a plaintiff to litigate the claim supports the view that the constitutional provision was not intended to be protected by the courts, but by the surveillance of Congress and, ultimately, the political process.[38]

While the Court has insisted that a generalized grievance is not sufficient to meet the "injury in fact" test,[39] an aesthetic interest in a clean environment was held to be sufficient to establish standing in *United States v. SCRAP*.[40] The *SCRAP* Court stated that standing should not be denied merely because the injury is one shared by many people.[41] However, the Court said that to justify standing, the plaintiff must allege a specific injury to himself in order to insure that the litigant has a direct stake in the controversy and to prevent "the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." [42]

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36. 418 U.S. at 180. This clause prevents a Congressman from holding a civil office in the United States while serving in Congress. U.S. CONST. art I, § 6, cl. 2.

37. 418 U.S. at 179.

38. *Id.* The Supreme Court stated that any other conclusion would allow citizens to oversee the conduct of the national government through lawsuits in the courts. *Id.* The Court noted that, if denied standing, dissatisfied citizens are still able to convince fellow electors to change members of the political branches who are delinquent in performing their duties. *Id.*

39. For a discussion of this requirement, *see* notes 31-38 and accompanying text *supra.*

40. 412 U.S. 669, 683-90 (1973). *Accord,* Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972). The Court had previously said, through dictum in *Data Processing,* that an aesthetic, conservational, or recreational interest by a plaintiff may be sufficient to grant standing. Data Processing Serv. Orgs. v. Camp, 397 U.S. at 54.

In *SCRAP,* standing was granted to the plaintiffs, a group of law students who challenged railroad rates fixed by an agency, who alleged standing on the basis that the high rates would reduce the use of reusable goods and encourage the destruction of timber, resulting in harm to the natural resources of the area. 412 U.S. at 678, 681 n.9. The plaintiff alleged that each of its members used these resources and that the harm to the resources affected their use. *Id.* at 678.

41. 412 U.S. at 686-87.

42. *Id.* at 687, *citing* Sierra Club v. Morton, 405 U.S. 727 (1972). In *Sierra Club,* the plaintiffs challenged governmental approval of the development of a national game refuge and a national park. *Id.* at 728-29. The plaintiffs sued as a membership corporation with a "special interest" in the conservation and maintenance of parks, game refuges, and forests in the United States. *Id.* at 730. By a 4-3 vote, the court denied the plaintiffs standing on the basis that a special interest in a subject is not sufficient grounds for standing, and that the plaintiffs must allege facts showing that they personally are adversely affected. *Id.* at 739-40. The Court said that broadening the categories of injury that may be alleged to support standing does not abolish the requirement that plaintiff must have suffered "injury in fact." *Id.* at 738. *Cf.* Laird v. Tatum, 408 U.S. 1 (1971) (Supreme Court denied standing, hold-

In considering standing to bring suit for a violation of the first amendment, the Court has taken a less restrictive approach than in cases concerning standing to assert interests in the clauses of Article I of the Constitution.[43] This is consistent with the Court's view that the purpose of the Bill of Rights was to withdraw certain subjects from political controversy, establishing them as legal principles to be applied by the courts.[44] The *Data Processing* Court stated, in dictum, that "[a] person or a family may have a spiritual stake in first amendment values sufficient to give standing to raise issues concerning the establishment clause and the free exercise clause."[45] This premise depends, in part, on the proposition that all citizens share a personal constitutional right to a government that "shall make no law respecting the establishment of religion."[46]

Although the Supreme Court has not held that there is citizen standing in first amendment cases, the Court, in *Abington School District v. Schempp*,[47] held that a Pennsylvania statute[48] which authorized Bible reading in a public school was unconstitutional, as a violation of the establishment clause.[49] While the Court did not specifically address the standing issue in striking down the statute, it recognized

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ing that there was no real harm or threat of harm to plaintiff). The *Sierra Club* Court continued: "[I]f a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any 'special interest' organization . . . ." 405 U.S. at 739. The Court did state, however, that an organization whose members are injured may represent those members in a judicial proceeding. *Id.* at 739, *citing* NAACP v. Button, 371 U.S. 415, 428 (1963).

Some commentators have interpreted the holding in *Sierra* as turning on a technical defect of pleading. *See, e.g.*, Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645, 667 (1973). Moreover, others, such as Professor Jaffee, a leading commentator in this area, favor generalized citizen suits in this area. *See, e.g.*, Jaffee, *The Citizen As Litigant in Public Action: The Non-Hahfelder or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968). Professor Jaffee argues that the very fact that the plaintiff would receive no profit in winning such a lawsuit shows a great desire on the part of the plaintiff to say all that can be said in support of his contention, thus ensuring concrete adverseness. *Id.* at 1038.

43. *Compare* notes 45-50 and accompanying text *infra, with* notes 31-38 and accompanying text *supra.*

44. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). The Supreme Court stated in *Barnette* that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Id.*

45. 397 U.S. at 154, *citing* Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

46. U.S. CONST. amend. I. *See* Flast v. Cohen, 392 U.S. at 114 (Stewart, J., concurring).

47. 374 U.S. 203 (1963), *aff'g*, 177 F. Supp. 398 (E.D. Pa. 1959).

48. *See* PA. STAT. ANN. tit. 24, § 1516 (Purdon 1962) (held unconstitutional).

49. 374 U.S. at 223-27.

the district court's finding that the parents of Pennsylvania school children had standing to bring the action.[50]

Where the plaintiff bases his right to sue on his role as a taxpayer, a separate test for standing has been applied.[51] The Supreme Court first enunciated the now famous "double nexus" test for taxpayer standing in *Flast v. Cohen*,[52] an establishment clause case.[53] To qualify under this test, the litigant must establish that the challenged statute is a spending or taxing law, enacted pursuant to Congress' Article I, Section 8 powers, so that his taxpayer status is linked to the challenged legislation.[54] Secondly, the plaintiff must show that the challenged statute exceeds the constitutional limitations on the government's taxing and spending power, so that the proper nexus between his taxpayer status and the alleged constitutional violation is shown.[55] The double-nexus

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50. *See* 374 U.S. at 203. For the district court's discussion of standing, *see* Abington School Dist. v. Schempp, 177 F. Supp. 398, 403 (E.D. Pa. 1959), *aff'd*, 374 U.S. 203 (1963) (holding that standing is appropriate because the alleged injury, if proven, was direct to the plaintiffs).

51. *See* notes 52-56 and accompanying text *infra*.

52. 392 U.S. 83 (1968). Prior to *Flast*, the leading case in the area of taxpayer standing was Frothingham v. Mellon, 262 U.S. 446 (1923). In *Frothingham*, the plaintiff attacked the Maternity Act, which provided for appropriations by the federal government to states in order to reduce maternal and infant mortality. *Id.* at 479. *See Maternity and Infancy Hygiene Act*, ch. 135, 42 stat. 224 (1921). The plaintiff alleged taxpayer standing on the ground that the statute would increase her taxes, resulting in the deprivation of property without due process of law. 262 U.S. at 486. The Court denied the plaintiff standing to sue stating:

> [A taxpayer's] interest in the moneys of the Treasury . . . is shared with millions of others; is comparably minute and interminable; and the effect of future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded to an appeal to the preventive powers of a court of equity.
>
> If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same . . . . We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.

Id. at 487-88.

53. 392 U.S. at 85. The plaintiffs in *Flast* alleged taxpayer standing to challenge payments to sectarian schools for the purpose of financing instruction and purchasing textbooks in reading, arithmetic and other secular subjects, as violating both the establishment and free exercise clauses of the first amendment. *Id.* at 85-86. These payments were made in accordance with Titles I and II of the Elementary and Secondary Education Act of 1965. *See* 20 U.S.C. §§ 241(a)-(c) & (e)-(f), 821-27 (1976). The *Flast* plaintiffs were granted taxpayer standing by the Supreme Court, thereby overruling the district court's decision. 392 U.S. at 106.

54. 392 U.S. at 102.

55. *Id.* at 102-03. The Court explained that it is not enough for the taxpayer to show "simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." *Id.* at 103. The Court went on to say that one of the evils feared by those who created the establishment clause was

requirement has been limited to cases in which a plaintiff asserts standing to challenge government action based solely on the fact that the action injures the plaintiff's interest as a taxpayer.[56]

Against this background, Judge Adams considered the question of individual and group standing to challenge the government's transfer of property to a sectarian institution.[57] Judge Adams first concluded that the plaintiffs had failed to satisfy the double-nexus test for taxpayer standing.[58] He then rejected the argument, which had been accepted by the district court,[59] that the failure to vest taxpayer standing meant that the plaintiffs had no basis to assert standing.[60]

Judge Adams then examined the plaintiffs' interest, as citizens, in the protection afforded by the establishment clause to the separation of church and state as an independent basis for standing.[61] To determine whether the "injury in fact" test had been met,[62] Judge Adams asked whether the plaintiffs were asserting a particular and concrete injury to a right protected by a constitutional guarantee, as opposed to a generalized grievance.[63] Judge Adams noted that under this line of analysis,

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that the taxing and spending power would be used to favor religion. *Id.*, *citing* 2 WRITINGS OF JAMES MADISON 183, 186 (Hunt ed. 1901).

Justice Harlan, dissenting, attacked the majority's double-nexus test as not measuring the plaintiff's interest in the outcome of a suit. *Id.* at 121-24 (Harlan, J., dissenting). Justice Powell has also supported the position that the double-nexus test does not test for concrete adverseness. *See, e.g.*, United States v. Richardson, 418 U.S. at 182-84 (Powell, J., concurring).

56. *See, e.g.*, Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 79 (1978) (holding that the *Flast* test did not apply because this case involved a citizen's suit, not a taxpayer suit).

57. 619 F.2d at 260-66. *See* notes 58-74 and accompanying text *infra.*

58. 619 F.2d at 259-60. Judge Adams held that under present law, litigants have taxpayer standing only to challenge exercises of the taxing and spending power and not actions authorized by other constitutional provisions. *Id.* at 260. For a discussion of taxpayer standing, *see* notes 52-55 and accompanying text *supra.*

Judge Adams questioned whether the current restriction of taxpayer standing to alleged violations of the taxing and spending clause is proper. 619 F.2d at 260. For a discussion of previous criticism of this rule, *see* note 55 *supra.*

59. *See* notes 9-10 and accompanying text *supra.*

60. 619 F.2d at 260. Judge Adams rejected the district court's assumption that the plaintiffs alleged only taxpayer standing. *Id.* Judge Adams noted that Justice Fortas has raised the issue of whether a citizen's interest in the establishment clause would be an acceptable basis for standing to challenge an alleged violation of the clause, but that the question has yet to be answered. *Id.* at 262, *citing* Flast v. Cohen, 392 U.S. at 115-16 (Fortas, J., concurring).

61. 619 F.2d at 261-66.

62. For a general discussion of "injury in fact", *see* notes 21-50 and accompanying text *supra.*

63. 619 F.2d at 262-65. For a discussion of cases where standing was denied because the plaintiffs' claims were seen as generalized grievances, *see* notes 31-38 and accompanying text *supra.*

the "injury in fact" requirement is not independent of the inquiry into the nature of the interest to be protected.[64]

In answering the question posed, Judge Adams held that the instant case did not involve merely a generalized claim, based on a constitutional provision which was not intended to be enforceable by the public,[65] but rather, concerned a constitutional provision which creates fundamental legal rights in each individual citizen.[66] Judge Adams noted that the Bill of Rights was specifically intended to establish certain limitations on the government as legal principles for the courts to apply.[67] He asserted that unless individuals who claim a violation of legal rights, bestowed upon them by the Constitution, have some recourse other than the political process, the individual rights are devoid of meaning.[68] From this reasoning, Judge Adams concluded that the plaintiffs in *Americans United* were not merely ideological plaintiffs, concerned with

64. 619 F.2d at 263. This appears to be the appropriate view of current standing law. *Compare* Flast v. Cohen, 392 U.S. at 102-03 (creating a separate rule for standing when the plaintiff is alleging an interest as a taxpayer requiring plaintiff to meet a double-nexus test) *with* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. at 79 (holding that plaintiff need not meet the double-nexus standard in order to have standing, when alleging standing based on his rights as a citizen). For a discussion of *Flast, see* notes 51-55 and accompanying text *supra*. For a discussion of *Duke Power, see* note 56 and accompanying text *supra*. This view of standing was expressed earlier by Judge Adams in Richardson v. United States, 465 F.2d 844, 872-73 (3d Cir. 1972) (Adams, J., dissenting), *rev'd*, 418 U.S. 166 (1974). *See* note 34 *supra*.

In holding that an examination of "injury in fact" includes an inquiry into the nature of the interest to be protected, Judge Adams contrasted cases in which standing was granted because the plaintiff was alleging injury to a fundamental individual right, with those in which standing was denied because no such claim of injury to a fundamental individual right was alleged. 619 F.2d at 263-64. *Compare* Baker v. Carr, 369 U.S. 186 (1962) (standing granted where the plaintiff alleged injury to his right to vote) *with* United States v. Richardson, 418 U.S. 166 (1974) (standing denied where the plaintiff alleged a constitutional violation of the receipts and expenditures clause). For a discussion of *Baker, see* notes 17-18 and accompanying text *supra*. For a discussion of *Richardson, see* notes 31-34 & 37-38 and accompanying text *supra*.

65. 619 F.2d at 215. Hence, Judge Adams did not view this case as similar to *Schlesinger* and *Richardson* because the alleged bases for standing in those two cases, he asserted, were constitutional provisions not intended to be enforced by each individual citizen but were "general directives to the Congress or the Executive . . . ." *Id.* at 263, *quoting* United States v. Richardson, 418 U.S. at 178 n.11. For a discussion of *Schlesinger* and *Richardson, see* notes 31-38 and accompanying text *supra*.

66. 619 F.2d at 264-65. In so holding, Judge Adams quoted the language of *Data Processing* which said, in dictum, that "a spiritual stake in First Amendment values [is] sufficient to give standing to raise issues concerning the Establishment Clause." *Id.* at 264, *quoting* Data Processing Serv. Orgs. v. Camp, 397 U.S. at 154 (bracket supplied by the *Americans United* court). For a discussion of this view, *see* note 45 and accompanying text *supra*. Judge Adams also analogized to the grant of standing in *Schempp*. 619 F.2d at 264, *citing* Abington School Dist. v. Schempp, 374 U.S. 203 (1963). For a discussion of *Schempp, see* notes 47-50 and accompanying text *supra*.

67. 619 F.2d at 265, *quoting* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). *See* note 44 and accompanying text *supra*.

68. 619 F.2d at 265.

enforcing generalized grievances; [69] instead, the plaintiffs' complaint was characterized as "a particular and concrete injury to a right that is . . . protected by the constitutional guarantee raised." [70]

In holding that the plaintiffs had standing, Judge Adams stated that an allegation of "injury in fact" to an interest protected by the establishment clause is sufficient to establish standing.[71] Under the court's rationale, the plaintiff need not actually prove that the government violated a legal right under the establishment clause in order to meet this threshold requirement.[72] This heavier burden of proof is for the merits of the case.[73] The court found that the plaintiffs had met this minimum standing requirement because it is "arguable that the Establishment Clause creates in each citizen a 'personal constitutional right' to a government that does not establish religion." [74]

Judge Rosenn concurred in the decision of the court, but provided an additional reason for finding standing.[75] Like Judge Adams,[76] Judge Rosenn viewed first amendment rights as different from the interests considered in *Richardson* and *Schlesinger*.[77] Judge Rosenn noted that to be effective, first amendment interests must be enforced through the courts and cannot depend on the political process for vindication.[78]

69. *Id.*

70. *Id.* Judge Adams explained that the plaintiffs' claim was that the property transfer injured their "individual and personal constitutional right of religious liberty and separation of church and state." *Id.*

71. *Id.*

72. *Id.* This is in accord with what *Schempp* had said concerning a challenge to a state action. *See* Abington School Dist. v. Schempp, 374 U.S. at 224 n.9. The *Schempp* Court had noted that "the requirements for standing to challenge state action under the establishment clause . . . do not include proof that religious freedoms are infringed." *Id.*

73. 619 F.2d at 265. Judge Adams noted that legal rights will be recognized in the plaintiffs only if the court determines, on the merits, that the government action is barred by the establishment clause. *Id.*

74. *Id., quoting* Flast v. Cohen, 392 U.S. at 114 (Stewart, J., concurring). The Court stated that "it may well be that the Establishment Clause should be enforceable at the demand of every individual who claims injury to an interest protected thereby." 619 F.2d at 266.

75. 619 F.2d at 266-68 (Rosenn, J., concurring).

76. For a discussion of Judge Adams' distinction of these cases, *see* notes 65-70 and accompanying text *supra.*

77. 619 F.2d at 266-68 (Rosenn, J., concurring). *Richardson* and *Schlesinger* involved attempts to enforce the receipts and expenditures clause and the incompatibility clause of the Constitution. *See* notes 31-38 and accompanying text *supra.* Judge Rosenn distinguished these cases as attempts to enforce provisions of the Constitution which were not intended to depend upon judicial relief for their efficacy and which do not give rise to a judicially cognizable controversy when violated. 619 F.2d at 266, 267 n.1 (Rosenn, J., concurring).

78. 619 F.2d at 266-67 (Rosenn, J., concurring). Judge Rosenn said that this is true because the establishment clause was designed to protect against abuses of political minorities by political majorities. *Id.* at 266 (Rosenn, J., concurring). For a further discussion of this view, *see* notes 67-68 and accompanying text *supra.* Judge Rosenn analogized establishment clause cases to first amendment free speech cases, where, he said, liberal standing rules have

Judge Rosenn also observed that statutes violating the establishment clause may not have a sufficient impact on any one person to qualify him as a proper plaintiff under traditional standing requirements.[79] Hence, there may be no better plaintiffs than exist here.[80] Upholding standing, Judge Rosenn concluded that "[i]f [these plaintiffs] do not have standing, it is probable that the transfer of property at issue here . . . would be placed beyond judicial review [and] the establishment clause would be rendered virtually unenforceable." [81]

Judge Weis dissented on the ground that there was no "injury in fact" to the plaintiffs.[82] He emphasized that a generalized grievance brought by concerned citizens does not meet the "injury in fact" standard.[83] In his analysis, Judge Weis emphasized that, in *Flast,* the Supreme Court had the opportunity to find citizen standing with respect to interests arising from the establishment clause but did not do so.[84] Judge Weis viewed *Flast* as an implicit rejection of standing predicated upon a shared individual right to a government that shall make no law respecting the establishment of religion.[85] He concluded that standing

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been applied to insure the ability of the minority to enforce the important right of free speech. *Id.* at 267 (Rosenn, J., concurring), *citing* Broaderick v. Oklahoma, 413 U.S. 601 (1973).

79. 619 F.2d at 268 (Rosenn, J., concurring). Judge Rosenn reasoned that statutes violating the establishment clause may have a general effect or purpose of aiding religion, so that they do not impact greatly on any one person. *Id.*

80. *Id.* Judge Rosenn concedes that one can conceive of economic interests which may be affected by establishment clause violations that would give rise to a plaintiff who can meet traditional standing requirements. *Id.* However, he argues that this will be rare and that, in any event, no such plaintiff is available in the instant situation since no other organization had actually applied for the land in question. *Id.* at 268 & n.2 (Rosenn, J., concurring).

81. *Id.* at 268 (Rosenn, J., concurring). Judge Rosenn noted that a number of other similar transfers would also be placed beyond judicial review. *Id.*

82. *Id.* at 268-71 (Weis, J., dissenting). Judge Weis noted that the Supreme Court, although expanding the category of actionable injuries, has not abandoned the "injury in fact" requirement. *Id.* at 268 (Weis, J., dissenting). For a discussion of "injury in fact," *see* notes 21-50 and accompanying text *supra.*

83. 619 F.2d at 269 (Weis, J., dissenting), *citing* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974). For a discussion of these cases, *see* notes 31-38 and accompanying text *supra.*

84. 619 F.2d at 269-70 (Weis, J., dissenting). In *Flast,* Justice Fortas, concurring, mentioned that perhaps a citizen's interest in the establishment clause, without reference to the taxpayer's status, would provide standing. Flast v. Cohen, 392 U.S. at 115-16 (Fortas, J., concurring). For a discussion of *Flast, see* notes 51-55 and accompanying text *supra.*

85. 619 F.2d at 269-70 (Weis, J., dissenting). Judge Weis stated that "[i]t is obvious that there were not enough votes approving this concept, for otherwise the majority would not have found it necessary to construct the complicated and detailed formula it used to bypass the venerable prohibition against taxpayer standing." *Id.* at 269 (Weis, J., dissenting). For a discussion of the majority's opposing view of *Flast, see* 619 F.2d at 260; note 60 *supra.*

should be denied when there is no cognizable injury to the plaintiffs because the plaintiffs' freedom of religion is not alleged to be affected.[86]

It is submitted that Judge Adams avoided the crucial question raised by *Americans United* — whether standing rules need to be liberalized in first amendment challenges to government action to allow a less traditional plaintiff, such as Americans United, to assert standing.[87] In order to avoid this issue, yet achieve the outcome he desired, Judge Adams unsuccessfully attempted to conform the *Americans United* case to the framework of Supreme Court precedent in the area of standing.[88]

Under Judge Adams' construction of past cases, generalized grievances of ideological plaintiffs are insufficient to provide standing.[89] Judge Adams points, however, to the importance of enabling an individual citizen to bring a suit for an arguable violation of the establishment clause because that clause creates a fundamental right[90] and then concludes that because fundamental rights, subject to judicial enforcement by an individual citizen, are involved, the plaintiffs' complaint is not general, but particular and concrete.[91] Further than this conclusory observation, though, Judge Adams never explains why Americans United are not pure ideological plaintiffs.[92]

While, as Judge Adams indicated, "injury in fact" and the nature of the plaintiff's alleged interests are related concepts,[93] it is submitted that the Supreme Court has refused to recognize an individual's alleged important interest in a subject matter,[94] and in particular, a concern

86. 619 F.2d at 270 (Weis, J., dissenting). Judge Weis stated that the plaintiffs did not allege any direct injury which the property transfer inflicted on them, but alleged merely that the transfer violated the establishment clause. *Id.* He rejected the majority's argument that the establishment clause creates a right capable of being enforced by all citizens. *Id.* at 271 (Weis, J., dissenting).

87. This question was addressed by Judge Rosenn. *See* notes 78-80 and accompanying text *supra.*

88. *See* 619 F.2d at 265, *citing* Flast v. Cohen, 392 U.S. at 129 n.18 (Harlan, J., dissenting). While Judge Adams, in discussing the "injury in fact" test, cited cases which appear to require some concrete impact on plaintiffs, he granted standing to plaintiffs who had not shown such impact. *See* 619 F.2d at 264.

89. 619 F.2d at 262-63. *See* text accompanying notes 62-63 *supra.* For a general discussion of cases denying standing to plaintiffs asserting generalized views, *see* notes 31-38 and accompanying text *supra.*

90. *See* text accompanying notes 66-67 *supra.*

91. *See* text accompanying notes 68-70 *supra.*

92. *See* 619 F.2d at 264-65. Judge Adams asserted that the plaintiffs had successfully alleged that the transfer "seriously injures their individual and personal constitutional right of religious liberty and separation of church and state." *Id.* at 265. It is submitted that the plaintiffs have not alleged facts to show that such an injury is not shared equally by the rest of the United States citizenry, and is, therefore, a generalized grievance. *See* 619 F.2d at 270 (Weis, J., dissenting); note 86 and accompanying text *supra.*

93. *See* note 64 and accompanying text *supra.*

94. The Supreme Court has specifically denied standing to plaintiffs asserting an interest in enforcement of Article I provisions of the Constitution

with the enforcement of the establishment clause,[95] as sufficient to establish "injury in fact". It is further submitted that it is difficult to envision a plaintiff more ideological than the plaintiffs in this case.[96]

Judge Rosenn's concurring opinion, it is suggested, properly concluded that the plaintiffs' standing should be recognized, not under existing case law, but rather under a broader view of standing appropriate to the fundamental interests embodied in the first amendment.[97] While the Supreme Court has previously denied standing to ideological plaintiffs,[98] it is submitted that standing should be liberalized, so that plaintiffs claiming infringement on a first amendment guarantee will have access to the federal courts. It is clear that the establishment clause was intended, at least partially, as a protection for minorities,[99] making its enforcement thoroughly unsuited for the political process,[100] unlike the provisions with which earlier Supreme Court citizen standing cases were concerned.[101] Moreover, the argument that rarely will a more appropriate plaintiff than Americans United be found in these types of actions, is sound.[102] It is submitted that if, in a substantial number of cases, no one has standing to challenge government action which is in violation of the establishment clause, the provision will lose its effectiveness.[103] To preserve the efficacy of the clause, therefore, it is submitted

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in *Schlesinger* and *Richardson*. For a discussion of these cases, *see* notes 31-38 and accompanying text *supra*.

95. *See* Flast v. Cohen, 392 U.S. 83 (1968). The idea of granting standing to a plaintiff based on his interest as a citizen in the enforcement of the establishment clause was raised in *Flast* but not accepted by a majority of the Court. *See id.* at 115-16 (Fortas, J., concurring). While standing was granted in *Schempp* to bring an action under the establishment clause, the plaintiffs in *Schempp* could claim a specific injury that was not shared equally by all members of the public. *See* Abington School Dist. v. Schempp, 374 U.S. 203 (1963); notes 47-50 and accompanying text *supra*.

96. *See* 619 F.2d at 270-71 (Weis, J., dissenting). It is submitted that Judge Weis is correct in his observation that "[t]he plaintiffs do not allege any direct injury that the transfer of the property has inflicted upon them or any direct benefit that will accrue to them as a result of the requested judicial action." *Id.* at 270 (Weis, J., dissenting). For a discussion of the requirements of direct injury and the necessity of the court being able to remedy the injury, *see* notes 28-30 & 41-42 and accompanying text *supra*. For a discussion of other cases involving ideological plaintiffs, *see* notes 31-38 and accompanying text *supra*.

97. For a discussion of Judge Rosenn's opinion, *see* notes 75-81 and accompanying text *supra*.

98. *See* notes 31-38 and accompanying text *supra*.

99. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943); note 44 and accompanying text *supra*.

100. 619 F.2d at 265; *id.* at 267 (Rosenn, J., concurring). *See also* note 44 and accompanying text *supra*.

101. *See* notes 31-38 and accompanying text *supra*.

102. *See* note 103 and accompanying text *infra*. There will be those rare cases where a better plaintiff is available, however. *See* note 80 *supra*.

103. If a minority cannot enforce the establishment clause through the courts, the establishment clause will not be accomplishing its purpose of protecting political minorities' rights to a government free from established reli-

that standing must be expanded in establishment clause cases. Although the dissenting opinion of Judge Weis is correct in its observation that the plaintiffs in *Americans United* are asserting a generalized grievance,[104] it is submitted that there will rarely be a greater individual impact in this type of establishment clause case because the prohibition is against the government.[105]

If the holding and rationale of *Americans United* are followed by other courts, the result could be to expand the law of standing to allow citizen standing to contest all government actions which allegedly violate a constitutional provision intended for the specific protection of individual citizens.[106] However, considering the Supreme Court's strict adherence to the notion that a generalized grievance is not sufficient to confer standing,[107] it is doubtful that the reasoning of the case will be applied to cases outside the first amendment area.[108]

It is also arguable that the holding of this case eliminates the need for the double-nexus test of *Flast* in establishment clause claims.[109] If so, there will no longer be any need for a plaintiff to assert his taxpayer status to establish standing when challenging a statute as a violation of the establishment clause if status as a citizen is sufficient. It is submitted that this is a further step [110] in the trend towards the elimination of the double-nexus rule.[111]

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gion. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). *See* note 44 and accompanying text *supra.*

An analogy may be drawn between this reasoning and the decision in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). In *Bivens,* the Court allowed a federal action for damages against federal narcotics agents who had violated the fourth amendment through an unreasonable search and seizure. *Id.* at 399. In this decision, the Supreme Court expressed a concern that the constitutional protection of the fourth amendment becomes ineffective without individual enforcement. *Id.* It is submitted that the same concern exists with establishment clause cases.

104. For a discussion of Judge Weis' opinion, *see* notes 82-86 and accompanying text *supra.*

105. *See* 619 F.2d at 268 (Rosenn, J., concurring); notes 79-80 and accompanying text *supra.*

106. This may include actions violating any of the Bill of Rights. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943); note 44 and accompanying text *supra.*

107. *See* notes 31-38 and accompanying text *supra.*

108. The Court has expressed a special concern with the protection of a citizen's first amendment rights, although this has previously been expressed in the context of free speech. *See* Bigelow v. Virginia, 421 U.S. 809, 815-18 (1975); Broaderick v. Oklahoma, 413 U.S. 601, 612 (1973).

109. For a discussion of *Flast, see* notes 52-55 and accompanying text *supra.*

110. The Court has already limited *Flast* to the narrow area of cases where plaintiff alleges taxpayer standing. *See* note 56 and accompanying text *supra.*

111. There is much support for eliminating this rule entirely. *See* note 55 *supra.*